

1 UNITED STATES DISTRICT COURT  
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3 WESTERN DISTRICT OF WASHINGTON AT SEATTLE

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4 MICROSOFT CORPORATION, )  
5 Plaintiff, ) C10-1823-JLR  
6 v. ) SEATTLE, WASHINGTON  
7 MOTOROLA INC., et al, ) August 29, 2013  
8 Defendant. ) TRIAL  
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10 VERBATIM REPORT OF PROCEEDINGS  
11 BEFORE THE HONORABLE JAMES L. ROBART  
12 UNITED STATES DISTRICT JUDGE

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13 APPEARANCES:

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15  
16 For the Plaintiff: Arthur Harrigan, Christopher  
17 Wion, David Pritikin Richard  
Cederoth, Andy Culbert, Nathaniel  
Love and Ellen Robbins  
18

19  
20 For the Defendants: Ralph Palumbo, William Price  
21 Brian Cannon, Kathleen Sullivan  
Andrea Roberts and Philip McCune  
22

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1                   THE COURT: Do appearances, please.

2                   MR. HARRIGAN: Good morning, Your Honor. Art  
3 Harrigan representing Microsoft. And to my right is  
4 Ms. Ellen Robbins from the Sidley firm.

5                   MS. ROBBINS: Good morning, Your Honor.

6                   MR. HARRIGAN: Mr. Pritikin from the Sidley firm.  
7 Mr. Cederoth from the Sidley firm.

8                   MR. CEDEROOTH: Good morning, Your Honor.

9                   MR. HARRIGAN: Mr. Culbert, from Microsoft.  
10 Mr. Shubham Mukherjee from the Sidley firm. David Killough  
11 from Microsoft. And my partner, Chris Wion.

12                  MR. WION: Good morning, Your Honor.

13                  THE COURT: Thank you.

14                  MR. PALUMBO: Good morning, Your Honor, Ralph Palumbo  
15 from Motorola. And I've got Ms. Sullivan.

16                  MS. SULLIVAN: Good morning, Your Honor.

17                  MR. PALUMBO: Kirk Dailey, Ellen Roberts and Bill  
18 Price.

19                  MS. ROBERTS: Good morning.

20                  MR. PRICE: Good morning.

21                  THE COURT: Counsel, I'm going to read you a note I  
22 got from one of the jurors and then ask your consent to my  
23 plan in regards to it. "Judge Robart, thank you for calling  
24 my work and getting them to pay me for the difference for the  
25 entire length of trial. It takes a world of stress off my

1       shoulders and I feel better about serving. I appreciate it."  
2       Signed by Justin Albert, which is Juror 7. I don't intend to  
3       file this, which is what I normally do with any note that  
4       comes from a juror. Does anyone have a problem with that?

5            MR. HARRIGAN: No, Your Honor.

6            MR. PRICE: No, Your Honor.

7            THE COURT: If anyone wants a copy, I made one for  
8       each of you.

9       And I'm working on a response to the note about indemnity,  
10      and I'm looking forward to seeing your language on it. So  
11      hopefully someone is going to pass that up at some point  
12      today.

13           MR. PRICE: And, Your Honor, I hope that -- would  
14      that preclude me from asking Mr. Gutierrez what they meant?

15           THE COURT: No. I think you'd want to more broadly  
16      ask that. Do you want to ask him why they contacted Marvell,  
17      or something?

18           MR. PRICE: What did they mean when --

19           THE COURT: Yeah, that's fine.

20           MR. PRICE: I might ask it in a leading question.

21           MR. PALUMBO: Your Honor, we discussed this last  
22      night. The indemnity provision that is referenced in  
23      Ms. Ochs' testimony comes out of the November 2004 agreement  
24      between Marvell and Microsoft, which is Exhibit 1620. And  
25      what we did is we looked at that provision, and as you might

1 imagine, it's the usual very lengthy indemnification  
2 provision. There is some language in the provision that  
3 clearly doesn't apply. It has to do with violations of  
4 representations of warranties. Product liability issues.

5 So what we thought we would do is you could either admit  
6 the whole exhibit with reference to that paragraph, and we  
7 could redact it -- the language clearly wouldn't apply in  
8 this situation -- just to simplify it for the jury. Or we  
9 can simply take that paragraph, do the redaction, and provide  
10 that to you so you can give it to the jury and say, this is  
11 the indemnity language that is in the November 2004  
12 agreement.

13 THE COURT: Has 1620 been admitted?

14 MR. PALUMBO: Well, it has not been admitted, Your  
15 Honor.

16 THE COURT: Well, that complicates my proposed  
17 response.

18 MR. PALUMBO: But we're happy to move its admission.  
19 If we need to, put a witness on the stand to identify it.  
20 But it is identified in Ms. Ochs' testimony. And she says  
21 affirmatively it's the November -- I think it's the  
22 November 30, 2004 agreement, which is the agreement Microsoft  
23 was referencing when they asked us to go get this RAND  
24 license. So if that's sufficient basis for admission, we  
25 would agree to admit 1620. And we would provide Your Honor

1 at the morning break the language of what we think should be  
2 given to the jury and the language that clearly doesn't  
3 apply, and just "X" it out so they're not confused by it.

4 MS. ROBBINS: The language we're referencing is in  
5 Section 13. Indemnity. Supplier will, at its sole expense  
6 and upon Microsoft's written request, defend, indemnify and  
7 hold harmless Microsoft subcontractors, their respective  
8 successors and assigns, and the respective directors,  
9 officers, employees, agents, customers, affiliates, and  
10 distributors, each of the foregoing, from and against any and  
11 all claims, actions, demands, legal proceedings, liabilities,  
12 damages, losses, judgments --

13 MR. PALUMBO: Why don't we -- we can pass this up,  
14 Your Honor.

15 THE COURT: I don't think you need to read it to me.  
16 What is Microsoft's position?

17 MS. ROBBINS: Our position is that that's what we've  
18 agreed to, the language as highlighted, and we would redact  
19 the remainder and have 1620 admitted.

20 THE COURT: All right. Counsel, what I was thinking  
21 about saying was something along the following: We are  
22 coached in our training that when we're asked what does a  
23 word mean, to say that a word has its customary English  
24 usage. And that's what I'm going to say is that, unless it's  
25 separately defined, it has its customary English usage. That

1 there has been -- and I will now be able to say, you will  
2 find that particular provision in the attached -- wherever  
3 we're going to use this. There has also been testimony about  
4 the provision. And you should be guided by your own  
5 recollection of that testimony.

6 I'm not permitted, as you all know, to offer testimony on  
7 my own, which is what happens if I try and say: This is what  
8 it means in the context of this.

9 So those are my thoughts on it and I look forward to  
10 seeing something --

11 MR. PALUMBO: That sounds very acceptable to me, Your  
12 Honor. Would you like to see this or should we just give it  
13 to you later?

14 THE COURT: If you can give it to me later, that  
15 would be fine.

16 Mr. Cannon.

17 MR. CANNON: Good morning, Your Honor. We had an  
18 issue that we raised with the clerk, it's now been resolved.  
19 But one thing that came up yesterday, Mr. Price mentioned a  
20 limiting instruction that we'd like to pass up. So if it's  
21 okay with you, I would pass it up to the court.

22 THE COURT: Yes. Who wishes to respond on behalf of  
23 Microsoft?

24 MR. PRITIKIN: I can respond to it, Your Honor.  
25 Obviously we would object to an instruction of this sort. We

1 don't think it's necessary or called for. And beyond that, I  
2 think it's wrong. I think there is evidence that Motorola  
3 breached -- it's not a central point of the case, and it's  
4 not a part of ours -- but there's evidence that they did  
5 breach their RAND obligations to RIM. There are a lot of  
6 findings the court made on it, on how they had RIM over the  
7 barrel and were extracting a lot of money from them on their  
8 standards-essential patents. I don't think we need to go  
9 into that, but I don't think it would be correct to say to  
10 the jury that there's no evidence that Motorola breached its  
11 RAND obligations to RIM. I don't intend to argue that.  
12 Mr. Harrigan doesn't intend to argue it.

13 In any event, the point of it is, they clearly were on  
14 notice -- to the extent they were injecting their good faith  
15 into this case -- they clearly were on notice that an  
16 important licensee was complaining about abuse of licensing  
17 practices.

18 THE COURT: Mr. Cannon, you get the last word.

19 MR. CANNON: Thank you, Your Honor. I think this  
20 issue was injected into the case yesterday. And this is a  
21 trial about Motorola vis-a-vis Microsoft. And RIM's  
22 allegations are just not part of this case, and it's just a  
23 separate case, separate litigation that went on.

24 THE COURT: You need to be careful, because my  
25 recollection is you are the one that interjected this into

1 the case.

2 MR. CANNON: The RIM license. But the allegations  
3 from the other case.

4 THE COURT: Could you respond specifically to the  
5 last sentence of your proposed limiting instruction? It  
6 seems to me that, "There is no evidence in this case."

7 MR. CANNON: In this case.

8 THE COURT: In this case there's findings of fact and  
9 conclusion of law 429 through 437, I think, which is not just  
10 evidence, it's conclusions. And it seems to me that I'm not  
11 sure that's an accurate statement.

12 MR. CANNON: I think the findings of fact and  
13 conclusions of law certainly are binding on the content of  
14 the RIM agreement. But how the RIM agreement relates to  
15 Motorola's RAND obligations vis-a-vis RIM, I think that's not  
16 part of the findings.

17 THE COURT: All right. I'll give you an answer --  
18 actually, I need to look at the findings, then I'll give you  
19 an answer. Thank you. Anything else, counsel?

20 MR. PRITIKIN: One item, briefly, Your Honor. You  
21 have the memos that have been provided by the parties on the  
22 communications with the Federal Trade Commission. One of the  
23 exhibits that is in the binder that was provided to us that  
24 they are planning to use with Mr. Gutierrez is a letter that  
25 was written by Microsoft to the Federal Trade Commission.

1 That is bound up in the question of the extent to which we're  
2 going to get into communications with the Federal Trade  
3 Commission about abusive standards-essential patents. What  
4 we would request is that any questioning on that letter be  
5 deferred until the court has had an opportunity to give us  
6 guidance on the scope of evidence relating to communications  
7 with the Federal Trade Commission.

8 THE COURT: When did Microsoft file its memo on that  
9 question?

10 MR. PRITIKIN: This morning. I believe it was at  
11 8:30 this morning, Your Honor.

12 THE COURT: Counsel, how am I going to be able to  
13 persuade you that the court has a lot to do, and when you  
14 file something at 8:30 this morning, don't come out here at  
15 9 o'clock and expect me to have read it. That's just not  
16 feasible. I don't know what the letter is. If the letter  
17 requires the context of why the FTC is investigating, then  
18 I'm going to permit it, because at that point Motorola has  
19 opened the door to it. If it doesn't require that context,  
20 I'm probably not going to admit it.

21 I'm having trouble, because both of your pleadings came in  
22 quite late. In our discussions about it, it seems to me it's  
23 not a guilty plea or a conviction, it's an investigation.  
24 That would argue against admitting anything further in  
25 regards to the FTC.

1       The letter that's ultimately -- what do they call it -- a  
2 commitment letter or something. It has a name. I don't know  
3 exactly how to analyze what that does. It seems to contain a  
4 non-admissions provision. And so I'm still trying to figure  
5 out who's on first here in regards to the use of that.

6       I've warned all of you that we're not going to go down  
7 rabbit holes. And that may be a rabbit hole. It seems to me  
8 that it would be appropriate, if the issue has been opened,  
9 if Mr. Dailey were on the stand and ask him, what was the  
10 policy then and what's the policy now? And the problem then  
11 becomes one of if he says, well, we had an FTC investigation  
12 and we decided to change our policy, that just opens that up  
13 again. So I must say that I'm still somewhat struggling and  
14 had hoped to get some guidance from you. But I've not had a  
15 chance to review it yet.

16           MR. PRITIKIN: I appreciate that, Your Honor. I  
17 think their memo came in in the wee hours of the morning.

18           THE COURT: I wouldn't call it wee hours, but it came  
19 in late at night.

20           MR. PRITIKIN: 12:45 a.m., I think, their revised  
21 memo. And in fairness, we should get those to the court  
22 earlier, clearly.

23           But what I would request, Your Honor, is that it's laid  
24 out in the memos of both sides. We could argue it.

25           Mr. Harrigan is the one who was planning to address the

1 issue. What I'm concerned about is that the -- we believe  
2 that the letter that they want to use, the communication to  
3 the Federal Trade Commission, is intimately bound up in this  
4 issue. It's discussed in our memorandum. We could preview  
5 that for you this morning, but we think that the best way to  
6 resolve it would be simply to hold that for now.

7 Mr. Gutierrez is in Redmond. He can be brought back and  
8 questioned on that, if necessary. But we don't think that it  
9 should be injected at this point until the court has given us  
10 guidance on it.

11 THE COURT: All right. Mr. Price. Their proposal is  
12 that you hold your fire on that one until I can read the  
13 memos.

14 MR. PRICE: Yes. And that is an attempt, basically,  
15 to really restrict a key part of this case. That letter was  
16 written in June 2011. There was no investigation of Motorola  
17 in June 2011. That letter contains admissions as to what  
18 Microsoft thinks about its history.

19 THE COURT: I haven't seen the letter yet, sir. I'm  
20 not contesting or questioning your representations. But it  
21 seems to, me until I get a chance to see the letter, I don't  
22 know any of this chronology. They're saying it does relate  
23 to the FTC, you're saying that it doesn't.

24 MR. PRICE: I realize if I use it, then Your Honor  
25 will judge whether or not that opens the door on a subsequent

1       FTC investigation.

2              The letter is, Your Honor, in the Gutierrez binder we gave  
3 you, it's Exhibit 2970.

4              THE COURT: All right. Are you going to get to this  
5 before the 10:30 break?

6              MR. PRICE: I hope I'm done by then, because we're  
7 burning time.

8              THE COURT: That's for sure. All right. Well, I  
9 guess what you're telling me is you're prepared to take your  
10 chances. So that's the way we'll treat it.

11             Mr. Harrigan.

12             MR. HARRIGAN: Just one comment, Your Honor, to  
13 explain this. According to Mr. Price's opening statement,  
14 this letter will be used to suggest that Microsoft was  
15 telling the FTC that Motorola's behavior over this period was  
16 fine. And part of the reason for offering these exhibits  
17 relating to their investigation is that, in fact, Microsoft  
18 told the FTC exactly the opposite, and that generated an  
19 investigation into the very practices that are at issue in  
20 this case. And so you cannot put in an exhibit that suggests  
21 that Microsoft was telling the FTC that everything was fine,  
22 without allowing Microsoft to establish that, in fact, it  
23 told the FTC that everything was anything but fine.

24             And I don't think Your Honor wants to hear argument on  
25 this whole issue until you've read the briefs, and I don't

1 plan to do that, but the issue here has to do with the course  
2 of conduct that didn't end until January of 2013 when they  
3 finally dropped their request for injunctive relief. So  
4 their state of mind is at issue during that entire period.  
5 They're saying everything we were doing is consistent with  
6 custom and practice in the industry. And during most of that  
7 time they were being investigated by the FTC and the European  
8 Union for hold-up via injunctive actions relating to  
9 standards-essential patents.

10 THE COURT: Well, counsel, let me close with this  
11 comment. You have a relatively simple issue before the  
12 court. You have a jury that is trying hard to understand  
13 this. Where you want to go with your proof is up to you,  
14 subject to 401, 402, and 403. I will tell you that if you  
15 start digging these rabbit holes, I'm going to allow full  
16 excavation, because I don't have any choice. And I'm not  
17 sure that's a good use of your time. But that's your  
18 decision.

19 But I'm not going to allow -- as both sides have attempted  
20 to do numerous times in this trial -- to get in one sliver of  
21 a subject without permitting the other side to introduce a  
22 fuller context in order to make that sliver less than  
23 misleading.

24 So, with that bit of guidance, as opaque as it may sound,  
25 we'll bring out the jury, unless someone has something else.

1 All right. Madame clerk, bring out the jury, please.

2 Mr. Gutierrez, wherever you are, you're on the stand.

3 (The following occurred in the presence of the jury.)

4 THE COURT: Mr. Price.

5 MR. PRICE: Thank you, Your Honor. Good morning.

6 Good morning ladies and gentlemen.

7 HORACIO GUTIERREZ

8 Previously being sworn, resumed and testified as follows:

9 CROSS EXAMINATION (Cont.)

10 BY MR. PRICE:

11 Q Good morning, Mr. Gutierrez.

12 A Good morning.

13 Q I want to go through chronologically now some of the  
14 things that happened and some of the things you testified  
15 about. And, Ken, if we could put up that timeline, again.

16 So, Mr. Gutierrez, we were talking about -- I think  
17 yesterday we had gotten up to this October 22, 2010 meeting  
18 in Seattle. Do you recall that?

19 A Yes.

20 Q After that you received a second letter from Motorola  
21 concerning -- it was the H.264?

22 A Correct.

23 Q And so if we look at the calendar here at the bottom,  
24 that's on the 29th. During the -- from then through the week  
25 of the -- up until November 9th, did you have any discussions

1 about those letters with anyone at Motorola?

2 A I don't believe so.

3 Q Well, in fact, between October 22nd and November 9th, did  
4 you have any discussions with anyone at Motorola concerning  
5 those two letters?

6 A I can't tell for sure. But I don't recall having had one.

7 Q And then on November 10th -- I'm sorry, on November 9th,  
8 then, Microsoft sued in the Western District of Washington,  
9 here, saying that those letters constituted breach of RAND,  
10 correct?

11 A Correct.

12 Q And if you look at Exhibit 7241 -- which is already in  
13 evidence I believe, Your Honor.

14 THE COURT: I think the clerk is making sure that it  
15 is. Yes.

16 Q Would you look at the bottom here. It says, November 9th.  
17 Brad Smith, that's Microsoft's general counsel?

18 A Yes.

19 Q And Scott Offer is Motorola's, correct?

20 A Correct.

21 Q It says, "As discussed, here are the papers filed. I'll  
22 look forward to talking again and to, no doubt, reading in  
23 the very near the work of your very good litigation team."  
24 Do you see that?

25 A Yes.

1 Q And the discussion that is referred to here is a  
2 discussion that had happened on that same day, correct?

3 A I believe so.

4 Q So there wasn't any phone call ahead of time saying,  
5 "We're going to sue you," correct?

6 A I don't think there was, no.

7 Q So the lawsuit itself was the first notice of that  
8 lawsuit, correct?

9 A Yes.

10 Q And then you forwarded that -

11 A Let me correct that, Mr. Price. The call that's  
12 referenced in the e-mail -- apparently there was a phone  
13 call, I wasn't party to that, but the e-mail by Mr. Smith to  
14 Mr. Offer says there had been a discussion, apparently that  
15 day. So that was probably the first notice. I don't know if  
16 the papers had been filed by then or not.

17 Q I understand. You don't know whether or not the lawsuit  
18 had already been filed?

19 A Correct.

20 Q But your understanding is it was filed on November 9th?

21 A Yes.

22 Q And if we could look at what was filed, then, it's  
23 actually attached to 7241. And you recall yesterday you gave  
24 some testimony that Microsoft was always willing to give  
25 respect to Motorola's intellectual property and its patents?

1 A Yes. Meaning we would be prepared to provide fair  
2 compensation for it.

3 Q Well, if you look at Paragraph 7 in this complaint, you  
4 see it says, "Microsoft does not accept Motorola's  
5 representation that any of its patents that it has identified  
6 to the IEEE or ITU are, in fact, necessary to implementation  
7 of compliant implementations of WLAN or H.264 technologies,  
8 nor does Microsoft concede that the particular  
9 implementations of such technologies in its products,  
10 practice any of Motorola's patents, including those  
11 identified by Motorola in relation to these technologies."

12 That was the allegation filed on November 9th, correct?

13 A Correct. At that point we're saying we're not accepting  
14 their unilateral statement that they are essential, because  
15 nobody had really tested that proposition, that those were  
16 self-declared essential patents. So it actually happens in  
17 the real world that when you look at the patents, some of  
18 them turn out not to be valid, some of them turn out not to  
19 be essential. And I think at this stage in the litigation  
20 we're simply saying, we're not taking it at face value, what  
21 they're saying. This is something that we want to review.

22 Q What you're saying is you're not conceding that it's  
23 essential just because it's declared, right?

24 A Right.

25 Q And you're saying that, we're not saying we even practice

1 these patents, correct?

2 A Yes. And that's the standard statement that one would  
3 make at this particular stage in a litigation like this.

4 Q By this time you had about five months to prepare for the  
5 question of whether or not these patents were essential or  
6 Microsoft was using these patents, right? Because you  
7 started investigation sometime in April, your preparation?

8 A No. These letters had been received just a few weeks  
9 before. So we really had no way of really focusing on these  
10 particular patents. These letters were -- this was November  
11 9th. Letters had been received on October 21st and  
12 October 29th.

13 Q What I'm saying, you testified -- tell me if this is  
14 correct -- that beginning in April, Microsoft started  
15 investigating public documents to see what patents Motorola  
16 might assert against Microsoft, correct?

17 A Yes. But that review did not, in any way, consider these  
18 particular patent portfolios. We had not really identified  
19 H.264 and 802.11 as patents that we would review. It was a  
20 much -- a higher-level review, based on the overall portfolio  
21 of Motorola. We had no way of being able to focus on these  
22 little pieces on these standards.

23 Q You said you practice WiFi?

24 A We do.

25 Q And I think I've heard comments in the courtroom from

1       witnesses that there are declared essential patents that are  
2       public?

3       A    That's correct.

4       Q    That it's easy to go and see whether or not Motorola has  
5       declared that it has essential patents to these standards,  
6       correct?

7       A    It would be if you were focusing, in particular, on those.  
8       But at that point we were just looking at the whole portfolio  
9       of Motorola. And it is just a fact, we didn't focus on these  
10      patents. So we really didn't have an opportunity to even  
11      begin thinking about these until we got the letters on  
12      October 21st and 29th.

13      Q    Let me ask you about that. You started -- Microsoft used  
14      those toggles with Xbox that had WiFi, they started doing  
15      that sometime, what, in 2002?

16      A    That sounds right.

17      Q    So Microsoft is practicing the standard in 2002?

18      A    That's correct.

19      Q    And then -- and sold a lot of those toggles?

20      A    Right.

21      Q    And Microsoft, again, is putting the WiFi into the Xbox  
22      itself, what, in 2009?

23      A    I don't know the dates for sure. At some point they were  
24      introduced, yes.

25      Q    And Microsoft knew it was practicing the standard?

1 A Yes.

2 Q And there's a publication that says, here are the people  
3 who declare that they have patents on those standards, right?

4 A Correct.

5 Q And I'm not suggesting you're legally required to do this,  
6 but since you know that there are all these people who have  
7 patents on what you're doing, or say they do --

8 THE COURT: Just a minute. Mr. Price, I'm told we're  
9 having a mechanical breakdown here.

10 (The proceedings recessed.)

11 THE COURT: Please bring the jury in.

12 (The following occurred in the presence of the jury.)

13 Q So, to be clear about these declared essential patents and  
14 about their being public, so Microsoft invested a lot of  
15 money into the Xbox and WiFi portion of it over the years  
16 from 2002 until 2010, correct?

17 A Yes.

18 Q And it collected a lot of money from those products?

19 A Yes.

20 Q Could you estimate how much from 2002 to 2010?

21 A I really cannot. I know that for a long time, actually,  
22 it was a money-losing business, and then it turned into a  
23 success. But I couldn't put a dollar figure to it.

24 Q In terms of revenues, billions?

25 A I think it would have been under a billion for most of

1       that time. I mean, for the whole period? Probably over a  
2       billion, yeah.

3       Q     And I'm going to put up a demonstrative that your counsel  
4       has used, I think this is Slide 7. And these are the folks  
5       that we've heard had declared essential patents on WiFi  
6       standards, correct?

7       A     I wouldn't be able to say that with certainty for all of  
8       them. But it sounds like a number of the players who would  
9       have patents in that field.

10      Q     Okay. And so from -- certainly you had no obligation from  
11       2002 to 2011 -- 2010 -- to go out to all these companies and  
12       say, hey, we're using WiFi technology, we'd like to pay you  
13       something. You would agree with that, you had no obligation  
14       to do that?

15      A     Yes. No, I don't believe we had an obligation to do that.  
16       What we did is, through the patent pool that had over 2,400  
17       patents in the field, we proactively secured a license to  
18       what we believed was the bulk of the patents in the field,  
19       and then relied on the fact that there were RAND commitments,  
20       that if there was ever anyone else who wanted us to pay  
21       royalties, that we would have an opportunity to then  
22       negotiate a RAND rate and be able to take care of those.

23      Q     That's not the WiFi pool. Wrong technology, isn't it?  
24       You're talking about the MPEG LA.

25      A     You're right. I'm sorry. Yeah, 802.11 now. Correct.

1 Q I'm talking about WiFi.

2 A Yes.

3 Q And there really isn't a viable strong pool in the WiFi  
4 area?

5 A There are some pools, but I don't think they're as  
6 successful as the one in H.264, you're right.

7 Q And so no pools that are successful -- you didn't think it  
8 was your obligation to go to each and every one of these  
9 folks and say, "We're using WiFi and your technology." You  
10 agree with that?

11 MR. PRITIKIN: Objection, Your Honor. 401, 402, 403.

12 MR. PRICE: This is foundation.

13 THE COURT: Let me read, please. I'll permit the  
14 question.

15 Q It's been awhile since I asked it, let me try again.  
16 You'll agree you didn't have an obligation to go to all these  
17 folks and say, "We are using the technology, how much money  
18 do we owe you?" You agree with that?

19 A I agreed that I don't believe we had an obligation.  
20 However, we did have licenses in place with multiple of the  
21 companies here that would have covered that technology.

22 Q You didn't have a license with the majority of these  
23 companies on WiFi, did you?

24 A Probably not more than half of the companies, yes.

25 Q And one of the things that you can rely on, then, is that

1 there is the RAND obligation, correct?

2 A I'm sorry, could you repeat that.

3 Q One of the things you can rely on, you don't need to  
4 contact these companies, because there's the RAND obligation,  
5 correct?

6 A That's correct.

7 Q So, for example, I don't want to pick out a company --  
8 they might become a client -- so, okay, just say a company  
9 here, they could be unreasonable as far as you know, correct?

10 A Yes, someone could be unreasonable.

11 Q Someone could be saying, we're declaring a patent when, in  
12 fact, their patent doesn't really cover the standard,  
13 correct?

14 A Yes. And that is actually not an uncommon situation.

15 Q So you can't look at these declared essentials and  
16 actually determine how many people actually have patents, is  
17 that what you're saying?

18 A Not without doing very elaborate and deep technical  
19 analysis of the patents and the technical specification of  
20 the standard.

21 Q So, for example, for a royalty-stacking analysis, you  
22 couldn't really multiply 92 times anything, because you don't  
23 know how many of these people really have patents that cover  
24 the standard, right?

25 A Well, I think for stacking, it is possible to make certain

1 assumptions as to what the patents are, based on the history  
2 of the standard, the contribution of the companies that are  
3 there. And that is as much of an economic analysis as it is  
4 a technical one. So I think it is possible to do an analysis  
5 of the impact on stacking on the standard, using just  
6 standard, you know, evaluation techniques that you would use  
7 in the field.

8 Q My question is different. You wouldn't use this 92  
9 number, because you said it's a common problem, these people  
10 probably are declaring patents that aren't really in the  
11 standard?

12 A Yeah. But it wouldn't be responsible to assume that none  
13 of them or that most of them will not have actual patents  
14 that will prove to be essential. I mean, these are serious  
15 technology companies, many of which are names that you  
16 recognize, that were involved in the development. So, you  
17 know, the probability that most of them will have those  
18 patents cannot be ignored.

19 Q I understand it can't be ignored. But you're protected  
20 because of the RAND commitment, correct?

21 A Yes. Including the fact that RAND ought to take into  
22 account the stacking factor.

23 Q So even if you think some people here that you don't know  
24 might be unreasonable, Microsoft feels comfortable going  
25 forward with its investment in Xbox, because it has the

1 protection of RAND. These people aren't entitled to more  
2 than a reasonable non-discriminatory rate, correct?

3 A Yes.

4 Q So now let's talk about your statement yesterday  
5 concerning -- I think you said that because of these letters  
6 that had been sent out in October, and the rate that they had  
7 in them, and that they were essential patents, you said that  
8 that affected the negotiations?

9 A Yes.

10 Q Do you recall that? Well, let me call your attention to  
11 the date, as to the date of your deposition, okay? And the  
12 second one. This is the one on May 24, 2013. Okay? Focus  
13 there.

14 Now, by that time you had all the facts pretty much  
15 that you've testified to to the jury about, you know, about  
16 these letters going out, about actions being filed, about an  
17 action in Germany, even the first part of this trial; you  
18 knew all that, correct?

19 A Correct.

20 Q So you were -- you knew, then, by May 2013 the  
21 circumstances that you testified to this jury about, the  
22 circumstances surrounding this case?

23 A Generally, yes.

24 Q It's true that, though, as of May 20, 2013 you could not  
25 think of any circumstance in which Microsoft would make a

1 counteroffer that was higher than Microsoft thought the  
2 patents were actually worth?

3 A That's correct. We wouldn't volunteer to overpay.

4 Q And in the negotiations that you had with Motorola, you  
5 didn't volunteer to overpay?

6 A Well, in the context of the negotiations, as I think we  
7 discussed a lot yesterday, where there's an effort to try to  
8 find an overall resolution to the case. In that context  
9 there were a number of conversations between Mr. Dailey and  
10 me where we tried to find a way in which that settlement  
11 could be brought about. Economic offers were made that try  
12 to achieve that. And in some of those I believe we were  
13 prepared to offer compensation to Motorola that we felt we  
14 wouldn't be offering in the absence of the threat of the  
15 injunctions coming from these patents.

16 Q You didn't offer to overpay on these patents, correct?

17 A There was not a discussion specifically about these  
18 patents in which I think we would have offered to overpay.  
19 We made economic offers on them. There were offers overall  
20 that we believe we were making because of the context of this  
21 litigation being in the background.

22 Q For these standards-essential patents, if we can take an  
23 example -- for example, we talked yesterday about  
24 Exhibit 7252. And this was this August 1st, 2011 letter that  
25 you sent to Mr. Dailey about H.264. Do you recall that?

1 A That Mr. Kaefer sent to Mr. Dailey, yes.

2 Q Yes, thank you. And this was about seven days before a  
3 mediation was scheduled between the parties, correct?

4 A That sounds right.

5 Q So, after this letter, the parties were going to get  
6 together with a judicial officer and talk settlement, right?

7 THE COURT: I'm not sure -- Judge Infante is retired.

8 So I'm going to sustain my own objection to the phrase  
9 "judicial officer."

10 Q A mediator, who had been a former judge.

11 THE COURT: Thank you, sir.

12 A Yes.

13 MR. PRICE: Always a judge in our hearts.

14 Q And if we look at the second paragraph here. The rate you  
15 offer is .018 per covered MMI device, correct?

16 A That's correct.

17 Q Now, as you know, the court in the earlier part of the  
18 case has said that the appropriate RAND rate for H.264 is  
19 .55, correct?

20 A Correct.

21 Q So this is about a third of the RAND rate?

22 A No, I don't believe so. You can't ignore the fact that  
23 there is a cap of \$585,000 per year, which means that if you  
24 divided that maximum payment by the number of units, I think  
25 you would come up with a different number.

1 Q Do you know what the number was?

2 A No. No. But what I'm saying is, your point is that rate  
3 in and of itself, yes, it is lower than the ones set by the  
4 court. As I said, this was the rate that we knew other  
5 members of the patent pool were receiving a license for. So  
6 we felt this was an objective way of presenting what was an  
7 offer based on objective criteria.

8 Q So two things. If there's a cap associated with a rate,  
9 you're saying that changes the rate?

10 A Yes.

11 Q So if, for example, Motorola offered 2.25 with a cap, that  
12 would actually change the rate, correct?

13 A Correct.

14 Q And Motorola did that throughout these negotiations,  
15 correct, offered to cap the amount of royalties?

16 A I'm not certain that that's the case, no.

17 Q Are you denying that?

18 A Did they offer a cap? I mean, their October letters  
19 indicated a 2.25 percent rate based on the final product.  
20 And I don't believe those letters included a cap.

21 Q No, sir, I'm talking about the discussions you had when  
22 you said there was this leverage, or discussions you had  
23 after you got together and talked about economic resolutions?

24 A Yes.

25 Q And there were term sheets?

1 A Yes.

2 Q Several of them?

3 A Correct.

4 Q Motorola offered a cap?

5 A Not on these patents. There was a cap on the overall  
6 exchanges for both sides. They were proposing caps that  
7 would cap what they would pay us, too.

8 Q Right. So caps change by what the effective rates are?

9 A Yes.

10 Q In any event, you said you had this hanging over your  
11 head, the idea of an injunction. But you never came forward  
12 and actually offered a rate that was more than what Motorola  
13 was entitled to, which is a RAND rate?

14 A Here's the part that confuses me, Mr. Price. That's the  
15 rate we were offering for a license to our patents. The  
16 letter also says that we would be prepared to pay them RAND  
17 royalties. But we don't say what the rate is that we would  
18 be paying them, or that there is a cap. We're basically  
19 saying, royalty rates that are reasonable royalty rates and  
20 are substantially similar to the ones we pay to the patent  
21 pool. We're not saying they have to be identical.

22 Q Let's go to the next paragraph. Here it has, "Reciprocity  
23 in the context of Microsoft's offer to MMI shall include  
24 MMI's commitment to grant Microsoft a license on fair and  
25 reasonable terms and conditions under MMI's H.264 patent

1 portfolio, with per-patent royalties being considered fair  
2 and reasonable royalties, provided they are substantially  
3 similar to Microsoft's per-patent share of royalties payable  
4 to Microsoft under the MPEG AVC patent portfolio license."

5 Do you see that?

6 A Yes. That's exactly what I said.

7 Q And the Microsoft patent per-share royalties -- the patent  
8 per-share royalties payable to Microsoft under that license  
9 were .018, correct?

10 A That's correct.

11 Q So, we talked about what you offered as a result of this.  
12 So let me ask you another question, then, which is, isn't it  
13 true that Microsoft didn't say, "We're going to pay a FRAND  
14 rate. We're committed to that," until after the filing of  
15 the German lawsuit?

16 A I don't believe so. I don't think that's right. I think  
17 there was a principle in this conversation, even from  
18 October 1st, where we made it clear to them that we were  
19 prepared to pay them fair rate for their patents. And when  
20 we filed this action asking for the determination of RAND, we  
21 intended that when that RAND rate was set, we would enter  
22 into an agreement and get a license on those rates.

23 Q And where is that in writing? Just tell me if you can  
24 identify it; where is that in writing?

25 A Well, you know, I told you about the context of the

1 conversations that happened on October 1st. So I guess  
2 they're in the transcript of my testimony.

3 Q How about a writing that was created at the time, at the  
4 same time you say that you committed to paying a RAND rate.  
5 Is there a writing that you created at the time that said  
6 that, prior to the German lawsuit being filed?

7 A I don't think it was put in writing, no.

8 Q And you also testified on your direct about these  
9 lawsuits. If we can go back to the timeline. And you see on  
10 the timeline, we have the October 21st and October 29th  
11 letters. And correct me if I'm wrong, but I think you said  
12 on direct that the purpose of these letters was to clear the  
13 way for Motorola filing a lawsuit. Do you recall that?

14 A Yes.

15 Q And let me talk about that. More than 99 out of 100 times  
16 Microsoft rejects the first offer made by someone wanting to  
17 license a patent, correct?

18 A Yes.

19 Q And that's not uncommon in the industry, is it?

20 A I'd say probably not.

21 Q And so it's kind of the expectation that the first offer  
22 is going to not be accepted?

23 A That's correct. In 99.9 percent of the case you haven't  
24 had someone tell you that they will sue you and send you a  
25 letter that anyone would read and understand that it's

1       intended not to be accepted, but just to comply with a  
2       formality to proceed with it. So, in the context of this  
3       engagement, to us it was very clear that they intended to  
4       file an action. And, by the way, that's exactly what they  
5       did.

6       Q     Well, you knew they were going to file an action when you  
7       filed your lawsuit -- you testified to that before --  
8       October 1st, 2010, you knew they were going to file a  
9       lawsuit?

10      A     Yes. Now I'm talking about specifically a lawsuit on  
11       H.264 and 802.11.

12      Q     And you knew they were going to file a lawsuit on any  
13       patents they thought they could use against you and say: We  
14       have value. You have value. You knew that as of  
15       October 1st, 2010?

16      A     We expected that, yes.

17      Q     Therefore you would expect them to file lawsuits on  
18       standards-essential patents if they thought they brought  
19       value to the table. You said that yesterday, correct?

20      A     Yes.

21      Q     Now, 99 out of 100 times in the industry, and certainly  
22       you, reject first offers, right?

23      A     Yes. I mean, typically in those cases the letter is the  
24       first conversation that happens on the topic. There was an  
25       ongoing conversation with Motorola that had preceded the

1 sending of the letters that provided the context.

2 Q There was no ongoing discussion with Motorola concerning  
3 the lawsuit, or what Motorola was going to assert, prior to  
4 this letter being sent out, correct?

5 A Correct. I meant more broadly.

6 Q So if -- Motorola would expect you to reject pretty much  
7 any offer they put on the table. 99 percent of the time  
8 you're going to reject the first offer and come back with a  
9 counterproposal?

10 A I don't know what they would have expected. But if they  
11 had come forward with a rate that we felt was reasonable,  
12 particularly in the context in which we were, we might have  
13 chosen to take the license and make sure that we didn't have  
14 to worry about those standards-essential patents and  
15 potential injunctions. If the rate had been anywhere near  
16 the ballpark of what we considered reasonable, we might have  
17 actually taken a license. It would have been to our benefit.

18 Q The expectation, though, is you're going to reject it.  
19 That's your expectation, right?

20 A Oh, their expectation I'm sure was that we were going to  
21 reject it, because the terms were clearly ones that we could  
22 not accept.

23 Q Pretty much any offer, because you reject 99 percent of  
24 offers.

25 THE COURT: Mr. Price, that's not a question, sir.

1 Q Pretty much any offer they are going to give you is going  
2 to be rejected. You reject over 99 percent of offers because  
3 you want to negotiate for RAND terms, right?

4 A That's all a function of what the economic terms of the  
5 offer are. If the economic terms of the offer are  
6 reasonable, we wouldn't reject 99 percent of them. It just  
7 so happens that if the offer is not an economically  
8 reasonable offer, then we wouldn't serve the company and our  
9 shareholders by accepting it.

10 Q So over 99 percent of the time the offers Microsoft gets  
11 are unreasonable?

12 A I think very frequently they are, yeah.

13 Q I asked a different question. Over 99 percent of the time  
14 the offers Microsoft gets are unreasonable?

15 A Yes, I think that's a fair statement.

16 Q So it's a common practice for the first offer to be more  
17 than you would want to pay?

18 A Yes.

19 Q Over 99 percent of the time that's the case?

20 A Yes.

21 Q So we talked about your practice on that. Now let's talk  
22 about the filing of the lawsuits by Motorola. If we can put  
23 the timelines up here. And you see that after Microsoft sued  
24 on November 10th, Motorola filed a number of lawsuits,  
25 correct?

1 A Yes.

2 Q And in those lawsuits -- you're familiar with them, you  
3 testified about them, correct?

4 A Correct.

5 Q You've seen the complaints, correct?

6 A Yes.

7 Q Okay. So in any of those lawsuits did Motorola say it was  
8 entitled to damages or an injunction because Microsoft  
9 rejected the offers in the October 21st and October 29th  
10 letters? If you look at those complaints, does it say that  
11 anywhere, that that's what gives Motorola the right to sue?

12 A It's been a long time since I read those complaints. And  
13 the ones in Germany, I don't read German, so I probably  
14 didn't read those. But I don't remember there having been  
15 references to the October letters. I could be wrong. But I  
16 don't recall there being a reference to those letters.

17 Q So you don't -- and you don't recall any situation where  
18 Motorola has used, or tried to use, Microsoft's rejection of  
19 those October letters as a reason to get an injunction or to  
20 get higher than RAND royalty rates?

21 A Yes. I don't recall that. But I don't believe the  
22 purpose of the letters was that. The purpose of the letters  
23 is to be able to say that they had made an offer that had  
24 been rejected, so as to be seen as complying with the  
25 practice when it comes to standards-essential patents. You

1 normally wouldn't sue when you have an obligation to offer a  
2 RAND license if you first haven't made that offer. Whether  
3 that was a fact that was cited in the complaints, I really  
4 don't know that.

5 Q Or anywhere. You don't know of any context in which  
6 Motorola has taken the position that because it sent out  
7 those October letters, that gave them the right to sue  
8 Microsoft for an injunction or for damages. You know of no  
9 context in which that's the case?

10 A No.

11 Q Is that correct?

12 A Correct.

13 Q And when the lawsuits were filed, Microsoft filed  
14 responses to those lawsuits, correct?

15 A Correct.

16 Q I take it that it is accurate that in responses to those  
17 lawsuits -- let me ask it a better way. In the responses to  
18 those lawsuits did Microsoft say: We're ready, willing, and  
19 able to pay RAND?

20 A So first I have to say, because I'm not a litigator and I  
21 really wasn't handling the litigation, I don't know that I  
22 can say that I read any of the responses. So I don't think  
23 I'm -- I don't think I have a factual basis to be able to  
24 tell you whether that's the case or not.

25 Q You don't know -- if you don't know, that's fine. You

1 don't know?

2 A I don't.

3 Q Okay. Well, do you know whether or not in those -- in the  
4 response to those lawsuits, Microsoft said that: We are not,  
5 in fact, infringing those patents. We are not using the  
6 technology at all?

7 MR. PRITIKIN: Your Honor, I'm going to object to  
8 that on 401, 402 and 403 grounds.

9 THE COURT: I'll permit the question.

10 A I don't know the answer to that. I would say, in general  
11 --

12 Q No, I don't want to ask you about things you don't know.

13 A If you ask me specifically about these answers to these  
14 complaints, then I really can't answer. I don't know.

15 Q And you don't know firsthand or someone telling you about  
16 it; you just have no knowledge of that?

17 A All I know from someone telling me about it is that at  
18 some point during the litigation, we, in court, made the  
19 statement that Microsoft is prepared to take a license on  
20 RAND terms. I don't know when in the process or in what  
21 document or if it was a written submission or a statement  
22 that was made in court.

23 Q Do you know whether or not at this time Microsoft  
24 contended that, in fact --

25 THE COURT: I'm sorry, sir, "at this time."

1                   MR. PRICE: I'm pointing to my screen, you're  
2 correct, Your Honor. Let the record reflect that I'm  
3 pointing to the November timeframe.

4 Q At that time in November of 2010 it's correct, isn't it,  
5 that Microsoft, in fact, took the position that the patents  
6 weren't even valid?

7 A Subject to the fact, as I said before, that when I read  
8 those responses was many, many, many months ago. You know, I  
9 think that's possible. I can't say for sure that's the case.  
10 I think that would be kind of the standard response to a  
11 complaint like that. You don't know -- in many cases you  
12 really don't know if patents are going to be valid or not --

13                   MR. PRITIKIN: Objection.

14                   THE COURT: He needs to ask you another question.

15                   THE WITNESS: Okay.

16                   THE COURT: The jury will disregard the last portion  
17 of the witness's response.

18 Q So I don't want to waste time asking things you don't know  
19 about, okay? So, if we go forward in the timeline, we talk  
20 about the Germany lawsuit, what was done in that. This is,  
21 again, something that you don't feel comfortable to talk  
22 about in any detail because you don't have firsthand  
23 knowledge of it?

24 A That's correct.

25 Q Now, I want to get back, then, to your perception of what

1 was going on in the October and November timeframe, actually  
2 through 2010, with respect to negotiations, okay?

3 A Okay.

4 Q So focusing on that timeframe, let me ask you the  
5 following: At the time of the receipt of these letters, or  
6 around the same timeframe -- October 21st to October 22nd,  
7 2010, to be specific -- Microsoft and Motorola were having,  
8 parallel with these letters, receipt of these letters,  
9 licensing discussions of a broader scope that would have  
10 encompassed the subject matter of these letters, true?

11 A Yes.

12 Q And these letters cover the subject matter of both 802.11  
13 and H.264, correct?

14 A We wanted them to. And we expected they would be covering  
15 them.

16 Q Well, those discussions covered, encompassed the subject  
17 matter of those letters, correct?

18 A These were very early discussions. So they were really  
19 not specific. But the idea would be that if the discussions  
20 were fruitful and successful, that there would be a  
21 resolution that would achieve complete peace between the two  
22 companies.

23 Q And thereby encompass both of these -- the subject matter  
24 of both of these letters, correct?

25 A That's what we hoped.

1 Q In the context of those negotiations, Motorola never  
2 referred to these letters, correct?

3 A No, they did not.

4 Q In fact, in the context of those negotiations, these sets  
5 of patents and technologies weren't really the focus of  
6 Motorola's presentation, correct?

7 A If you're talking about October 2010 and the meeting that  
8 happened then, I think that's right, there was no reference  
9 to that. There came a time in November and December of 2010  
10 in which we started having discussions about specific terms,  
11 and started exchanging high-level summaries of what a deal  
12 would look like. And in those, Motorola was insisting  
13 specifically that patents they owned for 802.11 and H.264  
14 that read on Windows would be excluded from the overall  
15 agreement. So we wouldn't end up having a license to that.  
16 So we would be put in the position where we would agree to  
17 this grand bargain and yet continue to be exposed to  
18 litigation on 802.11 and H.264 patents.

19 Q And how many -- is it true there were multiple meetings at  
20 executive levels and others, correct?

21 A When? I'm sorry.

22 Q During the timeframe October and November 2010, there were  
23 multiple meetings at executive levels and others, correct?

24 A If you choose to call me and Mr. Dailey executives, that  
25 would be right.

1 Q Well, would you put it that way?

2 A Mr. Dailey and I met -- I would say more talked on the  
3 phone a number of times. And there was a meeting, and  
4 perhaps even one or two calls at the general-counsel level,  
5 which definitely would be executives.

6 Q It's true, and your words would be, that there were  
7 multiple meetings at executive levels and others. Those  
8 would be your words, right?

9 A Yes.

10 Q And in your words that in those multiple meetings what the  
11 parties were focused on was trying to resolve the disputes  
12 between the two parties generally, correct?

13 A Correct.

14 Q And that in those multiple discussions, in those multiple  
15 meetings -- you said there were multiple meetings, correct?

16 A Yes. Now, these meetings can happen in different forms.  
17 They don't have to be face-to-face meetings.

18 Q You don't actually have to meet. When you said multiple  
19 meetings, you meant phone calls?

20 A In some cases were face-to-face meetings and some cases  
21 were phone calls.

22 Q So in these multiple meetings at executive levels, the  
23 topics of the specific patents were not a priority for either  
24 side, correct?

25 A I wouldn't say that. When, in December, we started to see

1       that Motorola was attempting to exclude the patents they had  
2       on H.264 and 802.11 from the scope of the license we would  
3       get, we actually focused on that and specifically insisted  
4       that if we were going to have an overall resolution, those  
5       needed to be part of the deal, and that Windows would have to  
6       be covered for those patents.

7       Q     After these overall discussions did not bear fruit in  
8       2010, there came a time when, in fact, the parties exchanged  
9       term sheets that covered these particular patents, correct?

10      A     Yes. Eventually they accepted our request that they  
11       needed to be covered.

12      Q     Well, what happened is that in 2010 the meetings that you  
13       wanted to have that would discuss a broader resolution did  
14       not lead to -- is it correct -- those meetings did not lead  
15       to an agreement?

16      A     That's correct.

17      Q     And then after the parties said -- or let's say you  
18       said -- let's talk about these specific patents, there were  
19       then back-and-forth term sheets about specific patents,  
20       correct?

21      A     I wouldn't characterize it that way. The reality is that  
22       there was a specific focus on these patents as part of the  
23       overall discussions when we started exchanging deal sheets on  
24       those. But they were later in the process throughout the  
25       months of engagement that we had. Some situations in which

1       we -- not having been able to make them part of the overall  
2       deal -- started discussing on some occasions whether there  
3       would be an opportunity to take care of those independently.

4       Q     And in those discussions there were term sheets that went  
5       back and forth about, okay, let's look at these  
6       independently, correct?

7       A     Correct.

8       Q     And you know that there were how many of those? A lot?

9       A     I wouldn't say a lot. There were a handful of them.

10      Q     Sure, okay. Well, that's my fault. Were there, you know,  
11       like about ten?

12      A     Probably under ten.

13      Q     And it's your belief that these letters need to be looked  
14       at in the context of the realities of the dynamic of the  
15       engagement between the two companies at the time. I'm going  
16       to assume that you know what that means.

17      A     What letter --

18                  THE COURT: He hasn't asked you a question.

19                  THE WITNESS: I'm sorry.

20      Q     Is that your belief, that you believed that the  
21       October 21st, October 22nd letters have to be looked at in  
22       the context of the realities that the dynamic of the  
23       engagement between the two companies at the time?

24      A     Yes.

25      Q     And that, in fact, when you guys first got together, there

1 really wasn't -- is this true -- there wasn't any signal from  
2 Motorola they wanted to have some kind of separate tracking  
3 negotiations; is that correct?

4 A When we got together at the very beginning in October,  
5 there wasn't, no.

6 Q The time you -- I'm not just talking about the October  
7 22nd meeting, I'm talking about the multiple executive-level  
8 meetings that took place in the October, November and  
9 December timeframe.

10 A Well, I wouldn't be able to say that there wasn't a  
11 separate track, because as I said, in the November and  
12 December conversations the position Motorola was taking is  
13 that those sets of patents on H.264 and 802.11 would not get  
14 licensed in the context of the overall deal. So I take that  
15 to mean that they would have to be handled independently.

16 MR. PRICE: Your Honor, under Rule 32 I'm going to  
17 ask that we be able to play, from Mr. Gutierrez's deposition  
18 testimony, page 20, line 18 to page 22, line 1.

19 THE COURT: What are the pages, again?

20 MR. PRICE: It's page 20, line 18, to 22, line 1.  
21 I'm requesting that under Rule 32 .

22 THE COURT: Any objection?

23 MR. PRITIKIN: Give me a moment to read it, Your  
24 Honor.

25 THE COURT: Mr. Price, is this the April 4th

1 deposition?

2 MR. PRICE: No, Your Honor, I apologize. It's the  
3 May 24, 2013. And it's 32(a)(3), Your Honor.

4 MR. PRITIKIN: Your Honor, I'm not sure why they want  
5 to do it. If they want to use their time to play this,  
6 they're certainly welcome.

7 THE COURT: Just tell me if you have an objection.

8 MR. PRITIKIN: I have no objection to playing this.

9 MR. PRICE: Thank you, Mr. Pritikin.

10 (The following is an excerpt of the video dep.)

11 Q Now, Mr. Gutierrez, now given your experience as to how  
12 these negotiations typically proceed, is it your  
13 understanding that in instances where a license, potential  
14 licensor says this offer is open for, you know, X number of  
15 days, is it your understanding that that somehow prevents  
16 Microsoft from making an offer after that 20 days?

17 A No, it doesn't prevent the other party from making an  
18 offer. But, in fact, we were having, in parallel with these  
19 discussions, with the receipt of these letters, we were  
20 having licensing discussions of a broader scope that would  
21 have encompassed the subject matter of these letters. And I  
22 think it's noteworthy that in the context of those  
23 conversations, these particular set of patents and  
24 technologies were never raised by Motorola as the focus of  
25 their dialog with us. Instead, in our multiple meetings at

1 executive levels and others, they were really focused  
2 elsewhere in terms of trying to resolve the disputes between  
3 the two parties, generally.

4 And these topics were never a priority for them in terms  
5 of trying to address them. But we were having licensing  
6 discussions even on the same day in which the first letter  
7 was received on October 22nd, there was a face-to-face  
8 meeting between the general counsels of both companies,  
9 Mr. Kirk Dailey and myself, where we discussed these -- the  
10 overall patent dispute between the parties and desire to move  
11 forward.

12 So, the letter has to be looked at in the context of the  
13 realities, the dynamic of the engagement of the two companies  
14 at the time. And we received no signal from Motorola that  
15 this was really a matter that they wanted to handle as a  
16 separate track negotiation apart from the overall discussions  
17 that we were having.

18 (The video excerpt concluded.)

19 Q Getting back to the timeline, then. Between October 22nd,  
20 the end of that meeting, and November 9th, the only response  
21 Microsoft gave to Motorola concerning these two letters was  
22 the lawsuit that was filed on November 9th, correct?

23 A Correct.

24 Q And certainly between those two times, between  
25 October 29th, say, and November 9th, you certainly never said

1 you needed more time to analyze the letters. You explained  
2 you had a quick reaction to them, correct?

3 A Yes.

4 Q In your direct you gave the opinion that Motorola was an  
5 outlier with respect to the Android patents?

6 A In terms of large companies, yes. I mean, there were a  
7 number of very small companies, too, that have inside  
8 licenses with us. But I think the vast majority of them they  
9 have.

10 Q And, of course, at this time, October 1st, 2010 when  
11 Microsoft sued Motorola, there was only one licensee, that  
12 was HTC, correct?

13 A Yes. Which at the time, I believe, was probably the top  
14 vendor of Android phones. And Motorola was, at the time,  
15 either the number two, or climbing up to becoming the number  
16 one.

17 Q And you based that on what?

18 A On industry analysis that was available.

19 Q And when you gave your opinion that Motorola was an  
20 outlier by contesting these patents, you took into account  
21 all the circumstance you know of to date about that, correct?

22 A No, there may be a misunderstanding. The reference that I  
23 made about Motorola being an outlier is looking at the  
24 situation now. I was talking about how today, when you look  
25 at smartphone devices, Android and smartphones that are sold

1   in the U.S., a very large percentage of those come with a  
2   license. At the time when these conversations were  
3   happening, as you said, there had only been one significant  
4   license with a major Android device vendor.

5   Q   And, in fact, if you look at the situation today, that  
6   October 1st lawsuit in the ITC, there was a finding that  
7   Motorola did not infringe the Android patents that you  
8   allege, except for one ActiveSync patent; isn't that right?

9   A   That's correct.

10   Q   And that was the one you said they had done a  
11   design-around on?

12   A   I don't know if they have effectively designed around. I  
13   know that they claim that they have designed around it. Now,  
14   in the ITC it's actually quite normal that only a very small  
15   percentage of the patents that are presented are ultimately  
16   found to have been violated. I think we looked at smartphone  
17   patent litigation, and generally the ITC, and only four in  
18   the last few years has been found. And one of them is ours.  
19   So it's not a bad outcome, from our perspective, given the  
20   realities of the ITC litigation.

21   Q   The reality of the ITC if you're seeking an exclusion  
22   order, you're telling us that it's really unlikely that  
23   you're going to get a finding of infringement?

24   A   No. I'm saying that it is common for patents that are  
25   presented for a determination by the ITC not to make it to a

1 violation. Like in our case, you can always win on one or  
2 two or three patents, and that's a realistic outcome. It's  
3 happened in our case and in others.

4 Q I'm trying to follow up, though, on what you just said.

5 A Yeah.

6 Q We know that with respect to the patents you were claiming  
7 that Motorola had infringed that pertained to Android --  
8 except for the separate ActiveSync patent -- that there was a  
9 finding that Motorola did not infringe those, correct?

10 A That is not correct. There were a variety of findings,  
11 some of which had nothing to do with whether there was  
12 infringement or there wasn't. That had to do with certain  
13 technical tests that the ITC has as to whether there's a  
14 domestic industry test that's met, or things like that, that  
15 have nothing to do with whether the patent is valid or  
16 whether the patent is actually infringed. But the part that  
17 is right is that there was only one patent out of the ones  
18 that we filed in the ITC that was ultimately found to be  
19 violated under the rules of the ITC. That was just the ITC,  
20 not the other parts of the litigation.

21 Q Because the other parts of the litigation haven't gone  
22 that far yet, correct, either in the state or --

23 A In the U.S. they haven't. In some other litigation it  
24 has.

25 Q And you said that's a satisfactory result in the ITC, I

1 think you said, because there are only four cases in recent  
2 history where the ITC has found a patent infringed; is that  
3 right?

4 A I'm talking about non-standards-essential patent  
5 litigation in the smartphone space, and I think there's only  
6 been a handful of them.

7 Q Wait a second. So when you gave us those statistics that  
8 it's rare to get a finding of infringement in the ITC, you  
9 were including standards-essential patents?

10 A There has actually been other cases more recently, having  
11 to do with standards-essential patents, that have resulted in  
12 the exclusion of the iPhone and some Samsung devices and  
13 things like that. I'm talking about the patents that we  
14 asserted, which are non-standards-essential patents.

15 Q Are you saying the ITC has different standards for  
16 determining infringement on standards-essential patents  
17 versus normal patents?

18 A I think that --

19 Q Is that what you're saying?

20 A I think that standards-essential patents are different in  
21 nature. And, therefore, the question is a simpler question  
22 for the ITC to look at. Is the standard implemented? Is the  
23 patent valid? You really don't have to prove infringement,  
24 as long as the standard is being implemented in the product.  
25 So I don't know the statistics would necessarily apply the

1 same if you looked at only standards-essential patents.

2 Q There's no different standard or test whether or not a  
3 patent is infringed in the ITC with respect to a normal  
4 patent and a standards-essential patent. There's no  
5 different test, is there?

6 A There is no different test. The patents are different,  
7 and therefore the analysis would be different as to whether  
8 the patent's been infringed or not. It's a simpler question.  
9 Is WiFi in the device? And then if the patent is valid and  
10 essential, then you don't have to get into the infringement  
11 discussion that you would normally have to get into with a  
12 non-standards-essential patent.

13 Q You've got to prove that you're using the standard, right?

14 A Right.

15 Q Which means you're practicing everything that's there,  
16 right?

17 A Correct.

18 Q The elements. And then you have to prove that the patent  
19 covers a subpart of those elements, correct?

20 A Yes.

21 Q And that's what you'd have to do for infringement, that  
22 you were using certain elements and the patent covers those  
23 elements, right? Is that correct?

24 A That's correct. What I'm saying is that, you know, you  
25 either are practicing the standard or you're not. And that's

1       not a very complicated issue to determine. Is the device  
2 connecting to WiFi? If the answer is yes, then the inquiry  
3 focuses exclusively on whether the patent is valid and met  
4 the other tests.

5       Q     It's whether the patent actually is in the standard.  
6       That's the same thing as determining infringement. When you  
7 look at claims, you look to see if they're being used, right?  
8       A     Well, is it the same thing as determining infringement? I  
9 don't think it is.

10      Q     Okay.

11            MR. PRICE: I've burned up too much time.

12            THE COURT: Counsel, we'll take our break at this  
13 time.

14            Ladies and gentlemen, I'll spare you your morning warning,  
15 because you know not to talk to each other or about the case  
16 until you hear all the evidence. I'll see you back out at  
17 10:45.

18            (The following occurred outside the presence of the jury.)

19            THE COURT: We'll be in recess, counsel.

20            (The proceedings recessed.)

21

22            THE COURT: Mr. Price, I understand you have  
23 something.

24            MR. PRICE: Very quickly, your Honor. It's just a  
25 verification so we have it on the record. They are planning

1 on calling Mr. Davidson before lunch. He is one of the folks  
2 that will testify about the German move. If you recall, a  
3 while ago both parties filed letter briefs on the German  
4 discovery issue, and whether the violations of the court's  
5 orders --

6 THE COURT: Yes, Mr. Cannon was set to argue that.

7 MR. PRICE: He was set to argue that. What we  
8 remember you saying was --

9 THE COURT: It was denied.

10 MR. PRICE: It was too late. What I wanted to make  
11 sure, your Honor, is that -- There were two parts of the  
12 motion. One was for more discovery, which I felt the too  
13 late probably dealt with. The other was precluding the  
14 witnesses from testifying because of that.

15 THE COURT: I denied that also. Counsel, I am fond  
16 of both of you, but both of you played that particular card,  
17 in terms of swords and shields. I thought you got sufficient  
18 discovery, I thought Microsoft got sufficient discovery, and  
19 both of you protected way more than I thought was  
20 appropriate. That was hard-fought litigation. That was the  
21 ruling.

22 MR. PRICE: Thank you.

23 THE COURT: Let's bring the jury in. Counsel, before  
24 we do, one further matter then. I am going to respond to the  
25 note about indemnity by saying: "Unless a term has been

1 subject to testimony to the contrary, a term has its normal  
2 English usage meaning. The term 'indemnify' is used in  
3 Exhibit 1620, Paragraph 13, which is attached. In addition,  
4 there has been testimony about this term during the trial.  
5 You may use this testimony to assist you to determine the  
6 meaning of the term."

7 Is that acceptable to Microsoft?

8 MS. ROBBINS: Yes, your Honor.

9 MR. PRICE: Yes, your Honor.

10 THE COURT: Thank you, counsel.

11 (At this time the jury entered the courtroom.)

12 THE COURT: Mr. Pritikin.

13 MR. PRITIKIN: Your Honor, there is a portion of  
14 Mr. Gutierrez's deposition that I would like to read under  
15 the rule of option completeness, since there were portions  
16 that were played during the prior examination. Page 28,  
17 Lines 13 to 24.

18 THE COURT: Any objection, Mr. Price?

19 MR. PRICE: Let me find it, your Honor.

20 THE COURT: The pages again, sir?

21 MR. PRITIKIN: Page 28, Lines 13 through 24.

22 MR. PRICE: That is not part of the rule of  
23 completeness for anything. I would object. Since it is not  
24 part of the rule of completeness, it is hearsay.

25 Sorry to interrupt. Go ahead and play it.

1                   THE COURT: You saved yourself -- Go ahead and play  
2 it.

3                   MR. PRITIKIN: I will read it.

4                   THE COURT: All right.

5                   MR. PRITIKIN: This is from the deposition of  
6 Mr. Gutierrez on May 24th, 2013. Question by Mr. Price:  
7 "Well, I will ask you about the situation, but I believe that  
8 the topic that you were designated to testify on here is, you  
9 know, topic one is an explanation of how a typical Microsoft  
10 patent license negotiation proceeds. You understand that?"  
11 Answer: "Yes." "And in preparing for that, you understood  
12 in testifying about how a typical Microsoft patent license  
13 negotiation proceeds, but you didn't necessarily mean how  
14 this one proceeded, you understand that?" Answer:  
15 "Correct."

16                   REDIRECT EXAMINATION

17 By Mr. Pritikin:

18 Q Mr. Gutierrez, if you have the binder that was provided by  
19 the defendants, if you could turn to Tab 7241, please, which  
20 is a copy of the complaint? Let's put up on the screen the  
21 paragraph that you were shown by Mr. Price during in his  
22 examination, Paragraph 7. Let's pull out Paragraph 7.

23                   Mr. Gutierrez, you may recall on the direct examination  
24 your attention was directed to the first sentence of the  
25 paragraph. Do you see that?

1 A Yes.

2 Q And in that paragraph, I will read it, it says --  
3 paraphrase it, "Microsoft does not accept Motorola's  
4 representation that any of its patents that it has identified  
5 to the IEEE or ITU are, in fact, necessary to the  
6 implementation of compliant implementations, nor does  
7 Microsoft concede that the particular implementations in its  
8 products practice any Motorola patents, including those  
9 identified by Motorola." And you were asked some questions  
10 about that, in which -- I think you were asked whether  
11 Microsoft had conceded that it was -- that these patents were  
12 being used or whether they were valid. Do you recall that  
13 testimony?

14 A Yes.

15 Q Now, there was a second sentence in the paragraph that was  
16 not highlighted when you were asked these questions by  
17 Mr. Price, and that's the one I want to focus on. Could you  
18 look at the second sentence? Could you read that one to the  
19 jury?

20 A "Nonetheless, Microsoft has to rely upon Motorola's and  
21 other similarly-situated patentholders' representations that  
22 all patent controversies may be avoided based on the offer of  
23 patent licenses on reasonable rates and non-discriminatory  
24 terms."

25 Q So for the purpose of paying a license, were you prepared

1 to accept that the patents were used?

2 A Yes.

3 Q What do you understand that sentence to mean?

4 A Well, that, you know, for a company like Motorola, when  
5 you look at patent assertions that they make, and they have  
6 multiple patents on the topic, it might be that eventually in  
7 court some of them may be found to be invalid or that the  
8 declarations they made saying that they were essential may  
9 technically not be so. But that doesn't mean that there  
10 isn't a probability that a number of them will actually end  
11 up being valid. And therefore, if there is an effort to  
12 offer a reasonable royalty, we would take that as granted for  
13 purposes of trying to avoid the lengthy and uncertain process  
14 of trying to invalidate the patents and going behind it. I  
15 think one has to be practical when it comes to these things.  
16 And, therefore, we took the offer --

17 MR. PRICE: I will object, your Honor. At this point  
18 it is beyond the scope of the question.

19 THE COURT: Sustained. Ladies and gentlemen, you may  
20 accept the first portion of that. And once it started into  
21 the narrative, you are to disregard the rest.

22 By Mr. Pritikin:

23 Q Let's look further down the same page at Paragraph 9 of  
24 the complaint. Do you see Paragraph 9, it says,  
25 "Accordingly, Microsoft seeks a judicial declaration that

1      Motorola's promises to the IEEE, the ITU, and their members  
2      and affiliates constitute contractual obligations that are  
3      binding and enforceable by Microsoft;" and, ii, "A judicial  
4      declaration that Motorola has breached these obligations by  
5      demanding excessive and discriminatory royalties from  
6      Microsoft;" and, three - and this is the one I want to focus  
7      on, Mr. Gutierrez - "A judicial accounting of what  
8      constitutes a royalty rate in all respects consistent with  
9      Motorola's promises for WLAN patents identified as essential  
10     by Motorola and for H.264 patents identified by Motorola."

11            What do you understand "judicial accounting" to refer  
12     to, sir?

13            MR. PRICE: Objection. Vague as to time and  
14     foundation.

15            THE COURT: Overruled.

16            THE WITNESS: That we were asking the court to tell  
17     us how much the RAND rate would be so that we could pay it.

18     By Mr. Pritikin:

19     Q    Now, in response to questions that were asked of you by  
20     Mr. Price, you said, in the investigation you had done of  
21     Motorola patents, you hadn't focused on standards-essential  
22     patents. Is there a business reason why a company doesn't  
23     focus on standards-essential patents?

24     A    Because there is a RAND declaration that provides us some  
25     assurance that we would be entitled to pay reasonable

1       royalties, and that therefore in due course would be able to  
2       secure a license on terms that would be acceptable  
3       commercially.

4       Q     Now, there were a number of points at which I think  
5       Mr. Price had asked you or referenced the deposition  
6       testimony you had given, and we have already read that  
7       segment for the benefit of the jury. I want to ask you some  
8       questions about some aspects of that, Mr. Gutierrez. I  
9       believe there was reference to testimony you had given that  
10      Microsoft would not overpay. Was that in reference to the  
11      typical negotiation?

12      A     Yes.

13      Q     And do you consider this to have been a typical  
14      negotiation?

15                  THE COURT: Counsel, you are leading.

16      By Mr. Pritikin:

17      Q     Was this a typical negotiation?

18      A     No, it was not a typical negotiation.

19      Q     I think there also was testimony you gave that you said  
20      that in 99 percent of the instances the incoming offers are  
21      unreasonable. Let me ask you first, how often do you get  
22      offers for standards-essential patents?

23      A     It is extremely rare.

24      Q     When you provided that testimony, were you referring to  
25      standards-essential patents or non-standards-essential

1   **patents?**

2   A   I'm sorry. When I provided what testimony?

3   Q   That 99 percent of the offers are unreasonable?

4   A   I was referring to non-standards-essential patents.

5   Q   When you get an offer on a standards-essential patent,  
6   what do you expect?

7   A   I expect that it will be a RAND rate or something close to  
8   a RAND rate.

9   Q   I think you also were asked on direct, and you provided  
10   testimony, that you expected Motorola to sue Microsoft. Did  
11   you, sir, expect them to sue you on standards-essential  
12   patents?

13   A   No, I didn't.

14                    MR. PRITIKIN: Nothing further, your Honor.

15                    THE COURT: Mr. Price.

16                    RECROSS-EXAMINATION

17   By Mr. Price:

18   Q   Mr. Gutierrez, you were testifying about the complaint and  
19   the request for an accounting. Do you recall that?

20   A   Yes.

21   Q   Did you draft the complaint?

22   A   No, sir.

23   Q   Did you review it before it was filed?

24   A   I believe I did.

25   Q   Was your approval necessary for the filing of the

1       complaint?

2       A   I don't think so, no.

3       Q   And were there discussions within Microsoft that the  
4       purpose of filing this complaint -- one of the purposes was  
5       to announce to the world that it was willing to pay any RAND  
6       rate on these patents?

7       A   No, there wasn't such discussion.

8       Q   And, in fact, you are aware that in an order in 2012 that  
9       there was a finding by the court - if I may, your Honor -  
10      that "An express statement that Microsoft seeks a license  
11      from Motorola's standards-essential patents is missing from  
12      its complaint"? You are aware of that?

13      A   No, I'm not sure I can say that.

14      Q   Were you aware that in recent papers, though, around -- in  
15      connection with what the court was observing, that Microsoft  
16      had finally affirmatively stated that it was ready and  
17      willing to take a license to patent some RAND terms?

18            MR. PRITIKIN: Your Honor, I may or may not have an  
19       objection. I would just like to know what the document is so  
20       I can look at it to see if -- Your Honor, I have no problem  
21       with this being read, provided the entire footnote is read.

22            MR. PRICE: I would be glad to read it. Should I  
23       read it, your Honor?

24            THE COURT: Please do.

25            MR. PRICE: "Although an express statement that

1 Microsoft seeks a license for Motorola's standards-essential  
2 patents is missing from its complaint, in its recent papers  
3 to the court Microsoft has affirmatively stated that it is  
4 ready and willing to take a license to such patents on RAND  
5 terms." And there is a parenthetical, "see example" --  
6 Should I interpret this? "Motion partial SJ Re injunctive  
7 relief at 5," paren, quote, "The indisputable evidence is  
8 that Microsoft is seeking a license on RAND terms in this  
9 very action," close quote, close parens. Pretty good?

10 And just so the jury is aware, the date of the order is, I  
11 believe, May 14th, 2012.

12 THE COURT: Mr. Price, give me a moment here. Ladies  
13 and gentlemen, they are quoting from an order that I have  
14 written. When I cite a case, I give the name of the case,  
15 the name of the order, and then sometimes you put a  
16 parenthetical in that takes a quote out of wherever that came  
17 from. That last part of that is a parenthetical. It makes a  
18 lot more sense if you see it in writing. But that's what was  
19 going on.

20 MR. PRICE: Thank you. I believe I have no further  
21 questions.

22 THE COURT: Anything else?

23 MR. PRITIKIN: No, sir.

24 THE COURT: You may step down, sir. Microsoft will  
25 call its next witness.

1 MR. HARRIGAN: Yes, your Honor. We would call  
2 Mr. Jeff Davidson.

JEFF DAVIDSON

Having been sworn under oath, testified as follows:

5 THE CLERK: Will you state your full name for the  
6 record, please?

7 | THE WITNESS: Jeff Davidson.

8 THE COURT: You may inquire.

## **DIRECT EXAMINATION**

10 | By Mr. Harrigan:

11 Q Mr. Davidson, would you give the jury a brief synopsis of  
12 your education and work experience leading up to your being  
13 employed at Microsoft?

14 A Yes. I have a degree in business management from the  
15 University of Phoenix. I have been at Microsoft now for  
16 eight years. Prior to Microsoft, I accumulated -- between  
17 Microsoft and part of Microsoft - over 20 years of experience  
18 in distributional logistics. I have worked for some very  
19 large tech companies, like Intermec Technologies, one of the  
20 world's largest wholesale distribution providers, as well as  
21 obviously Microsoft. And then I have also worked with a  
22 third-party logistics provider, which provides outsource  
23 distribution services similar to what Microsoft uses to run  
24 distribution centers.

25 Q So thirteen minus eight is five. So you went to work for

1 Microsoft in 2005?

2 A That's correct.

3 Q What is your current position?

4 A General manager of global supply chain operations.

5 Q And were you in that same position in early 2012?

6 A No. I was hired as a senior manager of North America  
7 distribution and logistic.

8 Q And when did you become the general manager?

9 A Three or four years ago.

10 Q So in early 2012 you were the general manager?

11 A Yes.

12 Q So you are the operation -- if I understand it right, you  
13 are the operations guy in the global supply chain for  
14 Microsoft?

15 A Yes.

16 Q Would you just explain briefly what that means? What is  
17 that job?

18 A Well, I run distribution and logistics fulfillment  
19 operations globally for Microsoft. Basically that includes  
20 all of the warehouses, all of the movement of product from  
21 our factories to our distribution centers and out to our  
22 customers. That includes figuring out where we put  
23 distribution centers, how big they are, who - meaning what  
24 suppliers - are going to run them, and so forth.

25 Q Does your division, the distribution outfit, handle all

1 Microsoft products?

2 A All physical Microsoft products, fully packaged products,  
3 likes Xbox, Windows, Office, keyboard, mice, Surface --

4 Q If Windows is delivered in a box, that is your problem?

5 A Yes.

6 Q If it is not delivered in a box, if it is electronic, that  
7 is not your problem?

8 A Correct.

9 Q Did Microsoft have a distribution facility in Germany in  
10 late 2011?

11 A Yes, it did.

12 MR. HARRIGAN: Your Honor, we would like to put up a  
13 demonstrative here, which is PDX 11.

14 THE COURT: Mr. Price, have you seen this, or whoever  
15 is handling this witness?

16 MR. PRICE: It is from the opening, your Honor. I  
17 have no objection to it as a demonstrative.

18 THE COURT: Ladies and gentlemen, a demonstrative,  
19 not an exhibit. Please proceed, Mr. Harrigan.

20 By Mr. Harrigan:

21 Q Using this for reference, Mr. Davidson, would you describe  
22 the German distribution facility and what it did?

23 A Yes. The German distribution facility was located in  
24 Germany. It basically fulfilled orders to our customers for  
25 all products across mainland Europe, basically in the EMEA

1 operations, that included Russia --

2 Q I'm sorry. You just said "EMEA." Would you tell us what  
3 that means?

4 A Europe, Middle East and Africa. So mainland Europe.

5 Basically everything in Europe, excluding the UK, Ireland and  
6 some of the Nordics. So what it included was Russia,  
7 mainland Europe, Middle East and Africa.

8 Q And how big was the facility approximately?

9 A The facility itself was 440-, 450,000 square feet, and we  
10 allocated about 330,000 square feet of that.

11 Q And how about the volume, what was the amount of stuff it  
12 handled?

13 A Over 25 million units of product annually. And that could  
14 be anywhere from 80,000 units a day to over half a million  
15 units a day that would be shipped, and about 40 to 60 trucks  
16 in and out a day.

17 Q Did Microsoft run this facility itself?

18 A No. We outsourced that to a company called Arvato.

19 Q Is that the normal practice for Microsoft's distribution  
20 facilities?

21 A Yes.

22 Q Are there other Microsoft distribution facilities in other  
23 parts of the world?

24 A There are.

25 Q As part of your responsibility, do you periodically review

1 the location of these distribution facilities to see if it  
2 still makes sense to have them there?

3 A Yes, I do.

4 Q And were you involved in doing that for Duren?

5 A Yes.

6 Q As of the end of 2011, what was your view regarding the  
7 suitability of the Duren location and facility for doing what  
8 it was doing?

9 A That Duren was the most optimal location to service the  
10 same region I described earlier, the most cost effective; it  
11 was the right size, it had a stable supplier. It was closest  
12 to our -- the most customers that we would service, close  
13 enough to a port, and it was cost effective.

14 Q Did Microsoft move this distribution operation out of  
15 Duren in 2012?

16 A Yes.

17 Q From where to where?

18 A From Duren, Germany to Venray, Netherlands.

19 Q Would you please explain the events that triggered  
20 considering the relocation out of Germany?

21 MR. PRICE: I object. That calls for a narrative.

22 THE COURT: Let's try and make it down, counsel.

23 By Mr. Harrigan:

24 Q When did this possibility arise?

25 A It was early to mid-January of 2012.

1 Q What happened?

2 A I was pulled into a meeting with -- my boss and I -- Owen  
3 Roberts, my boss at the time, as well as myself, were pulled  
4 into a meeting with our legal team, in particular Sean  
5 McKinley, and advised of a patent dispute between Microsoft  
6 and Motorola that had to do with video compression  
7 technology, and that it affected Xbox and Windows products.

8 Q What was the situation that affected Xbox and Windows  
9 products? What did they tell you might happen?

10 A Well, there was a potential injunction whereby we would  
11 not be able to sell or ship, in my case, products within  
12 Germany or outside of Germany, and that could go into effect  
13 as early as March 30th, 2012.

14 Q And what did you understand regarding - assuming the  
15 injunction was issued - how fast it would stop you from  
16 functioning?

17 A My understanding is it would be immediate and business  
18 would halt.

19 Q And if that happened, what would be the impact to  
20 customers and shipping?

21 A Since we were shipping product to retailers and  
22 distributors, the shelves would go dry, empty of Microsoft  
23 products, and it would affect their revenue as well. And  
24 they relied on our products to drive their business, as well  
25 as Microsoft's business.

1 Q Did you have another spot available where you could switch  
2 over and start shipping if that injunction came about?

3 A No, there was no other suitable site that existed. In  
4 fact, I considered one of our locations in the UK that could  
5 be a potential band-aid for maybe a week or two. But it  
6 definitely was not a suitable site.

7 Q Please tell the jury then what the alternatives were that  
8 you looked at in order to avoid this problem?

9 A There were a few. One was do nothing. That was a  
10 nonstarter, because the risk of disrupting supply to our  
11 customers far outweighed anything else. There was a need to  
12 act. Two, we looked at potentially converting the  
13 existing -- or another location within Germany to what is  
14 called a bonded warehouse facility. And then the third was  
15 to move outside of Germany.

16 Q Would you explain what you understood a bonded warehouse  
17 was and why it might have solved the problem?

18 A Bonded warehouse, I think in the most practical terms  
19 would mean that -- It would be a legal and tax structure  
20 that we would have to file with the government. And what  
21 that would mean is product could physically land in Germany,  
22 but it technically or legally would not be considered  
23 imported into Germany or on German soil. That's essentially  
24 what a bonded warehouse would mean.

25 Q Did you investigate that, and if so, what did you

1 determine?

2 A Yes. We investigated it and ruled it out for primarily  
3 two reasons. One was timing. The more I investigated it,  
4 and the team investigated it, the more clear it became that  
5 it would take definitely more than six months; a lot more  
6 likely, more than twelve months to complete. Two, the risk  
7 associated with it due to the complexity. Given that we do  
8 millions of transactions a year, basically all of those sales  
9 activities, inbound receiving of products and sales  
10 activities, would have a manual transaction associated with  
11 those. A manual transaction on top of the millions of  
12 transactions we already do, each would have a margin of error  
13 associated with that. And my understanding was that we  
14 needed to comply with -- if there was an injunction, we would  
15 need to comply 100 percent with it, and a scenario that meant  
16 risk with compliance was a nonstarter as well. So we ruled  
17 that out.

18 Q Okay. So I guess that left you with number three, which  
19 was relocating.

20 A Yes.

21 Q Once you focused on that alternative, how did you go about  
22 deciding where?

23 A Once isolating that as the most logical option, then it  
24 was a matter of finding the next best alternative to Germany.  
25 We looked at countries that basically surrounded Germany. We

1      Looked at northern France, Belgium, Luxembourg, Holland,  
2      Czech Republic, obviously the Netherlands. And within each  
3      of those countries we also looked at what could be suitable  
4      sites. What I meant by a suitable site, would be, A, it  
5      could be ready on time, because the timeline was actually  
6      right up at the top of the list as far as what we needed to  
7      hit. B, could it actually accommodate our business, meaning  
8      it had the size, scale and capacity to do it. And, C, there  
9      were other factors to consider like tax implications, labor  
10     unrest possibilities, the costs associated with them to the  
11     degree we could actually analyze the costs. Those would be  
12     all of the things that we would consider.

13     Q    Would you just give the jury a brief description of the  
14     resources that you brought to bear in the course of making  
15     the decision about the location you were going to choose?

16     A    Fairly substantial resources. Actually, it stretched  
17     across our company, a few groups. Trade was one, because we  
18     needed to be compliant with what other trade rules would be  
19     for import and export with any other country's product  
20     classifications and such.

21           Finance was another team that we brought in to evaluate  
22     it, because there would be tax and financial implications.

23           We flew in resources from around the globe to support the  
24     site selection. Obviously myself, my direct manager as well,  
25     and then pulled in people from Dublin. Also extended that to

1 include two suppliers in the site evaluation process. One  
2 was Arvato, who had -- we considered the incumbent that ran  
3 Duren --

4 Q They were the ones running the Duren facility?

5 A Yes. Two, was CEVA, who was someone we wanted to  
6 introduce as competition in the bidding process. So we  
7 pulled them in as well to help with the effort.

8 Q That went by a little fast. The competition in the  
9 bidding process, in other words, I take it you were trying to  
10 decide who was going to operate this Venray facility,  
11 correct?

12 A Yes, that would be part of the process.

13 Q Why did you want competition?

14 A It is important to have competition because -- We had  
15 been running Duren with Arvato for many, many years, since  
16 2001 actually, so over ten years. They knew our business  
17 quite well and were confident that it could go nowhere else.  
18 We were worried that those bids could come in substantially  
19 higher than would be palatable for our business. So we  
20 wanted to introduce competition in the process, and at a  
21 minimum have a benchmark for what costs could be or should  
22 be, at a maximum an alternative to Arvato.

23 Q Was all this effort you just described done in sort of a  
24 business-as-usual fashion?

25 A Absolutely not. There was a very rushed process.

1 Q Why did you choose Venray?

2 A Chose Venray, A -- one of the primary reasons we actually  
3 chose Venray was because it could be ready on time. When I  
4 say "it could be ready on time," A, it was within the size  
5 range -- from a size standpoint it was almost identical to  
6 the size of Duren as a building. Number two, the landlord  
7 was also the developer. So any construction that needed to  
8 be done on that site, since he was a developer, could  
9 accelerate that process through permitting and the actual  
10 construction, much of which he would do himself. And then,  
11 C, for economic reasons. For the customers it was the  
12 next-best site -- or country to Duren, Germany.

13 Q Without going into great detail, would you give the jury  
14 an idea of what physical changes were needed at Venray to get  
15 it ready for Microsoft to be able to use it?

16 A We needed -- we had to put up fencing, we had to pour  
17 foundation, work both inside and outside of the warehouse.  
18 There was a shell of a warehouse, which I think it was like  
19 three or four buildings kind of put together. Some of those  
20 buildings required foundations poured on the inside so that  
21 we could put racking on top of that. We had to run  
22 electrical, we had to run security systems throughout that  
23 building, employee parking lot, entrances, put up offices.  
24 It was a major construction.

25 Q And give the jury an idea of what you had to do in order

1 to get it ready to operate, as opposed to the physical  
2 changes?

3 A To get it ready to operate, one was selecting who was  
4 going to run it. Two was giving them the authorization to go  
5 spend the money to buy equipment, get the construction done,  
6 sign the lease, start hiring people, so that once we were  
7 ready to turn on the lights and start running the building  
8 that there were actually people that had training and knew  
9 somewhat what to do, so the building could actually start  
10 operating, as well as all of the construction supporting  
11 activity. The other thing was developing a plan so that that  
12 transition would be as transparent as possible to our  
13 customers. There were a number of things involved with  
14 making that work.

15 Q Thank you. Have you ever been involved in moving a  
16 distribution facility of this size before in your career?

17 A Oh, yes.

18 Q So what was the timeframe for that operation?

19 A It is pretty common for an operation of that size, that  
20 involves supplier selection as well, to go anywhere from 12  
21 to 18 months in duration.

22 Q And what was the approximate timeframe here in which you  
23 accomplished the same -- more or less the same thing?

24 A From the point we decided to award the business to the  
25 point we went live, 47 days.

1 Q And who was chosen to operate the new Venray facility?

2 A CEVA.

3 Q And did Arvato still have some role there?

4 A Oh, yes, Arvato still ran our warehouse in the UK. Arvato  
5 still runs our freight management throughout Europe. They  
6 also run a Dubai warehouse, a small operation there. And  
7 then they do -- CEVA would essentially hook up  
8 systematically with Arvato so that they could transact. So  
9 basically Arvato still supports many of the system activities  
10 in Venray.

11 Q Were you and the other people in your organization at  
12 Microsoft doing anything else during this timeframe?

13 A We were doing a lot of other things, yes.

14 Q So was this a convenient time to decide to move a  
15 warehouse?

16 A This was the absolute worst time on our organization.

17 Q Let's talk about -- I would like to switch now over to  
18 what the costs were -- the nature of the costs. We will have  
19 another witness talk about the amounts. But I would like you  
20 to explain to the jury what the nature of the costs were that  
21 incurred in connection with the relocation. Could you  
22 identify - you should have an exhibit there - 6024, and tell  
23 us just what that exhibit is?

24 A Yes.

25 Q Don't go into any detail. Just tell us --

1 A 6024 is a contract between Microsoft and CEVA.

2 Q For the Venray facility?

3 A For the Venray facility.

4 MR. HARRIGAN: We will offer 6024.

5 MR. PRICE: No objection.

6 THE COURT: 6024 is admitted and may be published.

7 (6024 admitted.)

8 By Mr. Harrigan:

9 Q What was the subject that this agreement dealt with?

10 A The running of the operations of Venray; also, the  
11 one-time costs that we incurred associated with the move and  
12 the ramp-up of that site.

13 Q And could you turn to the page -- Let's put up a page of  
14 this as the next slide. This is Section 3.1 of that  
15 agreement?

16 A Correct.

17 Q And would you just explain what this deals with?

18 A Yes. This deals with a one-time lump-sum fee that we paid  
19 to CEVA for the start-up and ramp -- what I call "ramp,"  
20 meaning going from zero to a productive state. Of the  
21 operation in Venray, it covered everything from developing a  
22 warehouse management system so the operation could run, to  
23 hiring people, doing the training, to some of the  
24 construction activity that would roll into the lease,  
25 starting to get engineering work on the material handling

1 equipment, and then subsequently all of the orders and  
2 purchasing of that activity.

3 Q And what was the financial arrangement for that work?

4 A It cost €7.6 million. That was a one-time fee.

5 Q A one-time fee?

6 A Yes.

7 Q And did Microsoft pay that?

8 A Yes.

9 Q We have another demonstrative. Did you prepare a list of  
10 the one-time expenses that were incurred in connection with  
11 the move?

12 A Yes.

13 Q Would you put up the next slide, please. This is a  
14 demonstrative.

15 THE COURT: Have you seen this before?

16 MR. PRICE: I have been shown it. It is fine. It is  
17 not evidence.

18 THE COURT: Ladies and gentlemen, once again, a  
19 demonstrative. It is a chart or summary of testimony you are  
20 going to hear. It is no better or worse than the testimony  
21 you hear in terms of your acceptance of that.

22 By Mr. Harrigan:

23 Q The heading here is, "One time moving/start-up expense  
24 categories." Is that in fact what is on here?

25 A That covers one-time move and start up, yes.

1 Q And number one, is that the same €7.6 million item that we  
2 just looked at?

3 A Yes, it is.

4 Q Would you briefly explain to the jury what the other seven  
5 items are, 2 through 8, on this list of one-time moving and  
6 start-up expenses.

7 A Yes. Number two, the exit and termination of -- That was  
8 a fee paid to Arvato for terminating the operation in Duren,  
9 Germany. I think that was €500,000. Number three was --  
10 there was --

11 Q Let me interrupt you. So there was a termination fee paid  
12 to Arvato for terminating the German contract?

13 A Yes.

14 Q Go ahead.

15 A Number three, in June there was some duplicate warehouse  
16 costs, in other words, some bleed-over or layover left in the  
17 German warehouse that we needed to pay some duplicate rent  
18 on.

19 Q You had to pay duplicate rent?

20 A Yes.

21 Q Meaning?

22 A Meaning we had Venray up and running in June, and we also  
23 had Duren -- had some small amount of products still left to  
24 be moved. And so that was a rent associated with that.

25 Q So you paid June rent in two places?

1 A Yes.

2 Q Go ahead.

3 A Number four, we had to move approximately 20 to 22,000  
4 pallets of product. And so number four is actually the cost  
5 of the trucks to move them from one site to the other.

6 Number five was the cost in the Duren, Germany location to  
7 pull product off the shelves and load them into the trucks,  
8 the 20 to 22,000 pallets. Number six, as I described  
9 earlier, we had heavy evaluation of multiple countries and  
10 sites that we needed to pull our tax and finance and trade  
11 teams into. And so there was some consulting costs. There  
12 was also some costs associated with setting up a new plant  
13 systematically, data maintenance and things like that.

14 Number seven were the costs we paid to Arvato for integrating  
15 with -- integrating systems with CEVA so they can transact,  
16 as well as some of the costs associated with Microsoft  
17 receiving feeds from them systematically. Number eight, we  
18 were moving 20 to 22,000 pallets of product that was high  
19 value, and so we added security to those moves to prevent  
20 theft.

21 Q So these were all just one-time costs of making the move?

22 A One-time costs for making the move, yes.

23 Q And then were there also differences in the operating  
24 costs as between the German facility and the new Venray  
25 facility?

1 A Yes, there were.

2 Q And have you -- could you identify Exhibit 6024?

3 A Yes. 6024 is the contract that covers those operating  
4 expenses as well.

5 MR. HARRIGAN: We will offer 6024.

6 MR. PRICE: No objection.

7 THE COURT: 6024 is admitted and may be published.

8 (6024 admitted.)

9 By Mr. Harrigan:

10 Q Are there two kinds of operating costs?

11 A Yes.

12 Q Would you explain what they are?

13 A One is -- it is called fixed expenses. Those are expenses  
14 like rent that don't vary much month to month. Two is  
15 variable transaction fees. Those are fees that could change  
16 depending on volume and the type of handling unit being  
17 touched, so to speak. For example, if you are shipping a  
18 product on a pallet, that's one cost. If you are shipping --  
19 if you are taking product off a box that is on a pallet, that  
20 would be another type of cost. That would be a different  
21 unit of measure. And so each of those activities would have  
22 a different fee associated with them.

23 Q And are those operating costs with respect to Venray  
24 covered in Exhibit 6024?

25 A Yes, they are.

1 Q And then did you also have -- had you had a contract with  
2 Arvato for the German facility that also dealt with operating  
3 costs?

4 A Yes.

5 Q Could you identify Exhibit 6445?

6 A 6445 is the contract we had in place with Arvato that  
7 covered the fees in the Duren location.

8 MR. HARRIGAN: We will offer 6445.

9 MR. PRICE: No objection.

10 THE COURT: 6445 is admitted and may be published.

11 (6445 admitted.)

12 By Mr. Harrigan:

13 Q And last but not least, did you also have a contract with  
14 Arvato with respect to the part of the Venray operation that  
15 they would be doing?

16 A Yes.

17 Q And could you identify Exhibit 6394?

18 A 6394 is the contract and pricing that covers those  
19 expenses as well.

20 Q So that's the continuing distribution work that Arvato  
21 did. The same company that had done all of the German  
22 facility was doing the distribution part of the Venray  
23 facility, right?

24 A Yes. This covers the UK, the systems work they do in  
25 Venray, as well as freight management in Dubai.

1 Q Before this issue with regard to the German injunction on  
2 the video patents came up, had you been planning to move the  
3 Duren facility?

4 A No.

5 MR. HARRIGAN: No further questions.

6 CROSS-EXAMINATION

7 By Mr. Price:

8 Q Good morning, Mr. Davidson.

9 A Good morning.

10 Q First, let me ask you, was David Treadwell involved in the  
11 decision to move the German facility?

12 A No, not to my knowledge.

13 Q Let me ask you then about that move and the timing of it.  
14 I am going to put up a demonstrative. It is slide 30. We  
15 will hand them out. This was used in opening. It is not  
16 evidence. Maybe I can get some of this into evidence.

17 Let me ask you whether or not you have knowledge of  
18 whether or not Motorola filed a patent infringement lawsuit  
19 in Germany on July 6th and July 7th, 2001? Do you know if  
20 that is accurate or not?

21 A I do not.

22 Q Have you heard anyone talk about the timing of the filing  
23 of the lawsuit?

24 A No.

25 Q You did testify, though, that you first considered -- you

1 did, moving out of Germany in January 2012, correct?

2 A Yes.

3 Q Assuming that the lawsuit was filed July 6th or 7th, 2011,  
4 do you have any knowledge as to why Microsoft's attorneys  
5 would wait for six months before coming to you and  
6 Mr. Roberts and talking about legal issues?

7 A No.

8 Q You decided to move out of Germany, you said, in  
9 March 2012?

10 A That would have been the final decision, yes.

11 Q And before that, in February of 2012, Microsoft had told  
12 Arvato that it would be terminating its services, correct?

13 A Correct. Arvato requested formal notification in February  
14 when they were alerted to the injunction -- the possibility  
15 of an injunction as well.

16 Q Did you have any knowledge as to why it took -- Let me  
17 rephrase that. You mentioned that this move took place at a  
18 bad time for you, right?

19 A A very bad time.

20 Q It would have been a better time if it had been July 6th  
21 or 7th, 2011?

22 A There wouldn't ever -- I can't actually comment on  
23 whether or not that would have been a better time or not.

24 Q So they are all bad times?

25 A They are all bad times. A move of this size -- I mean,

1 the facility was basically -- a practical description would  
2 be the size of seven or eight football fields. And so moving  
3 a facility of that size, there was never a good time to do  
4 it. It is not something to take lightly.

5 Q Always difficult. When you are rushed, though, costs are  
6 higher, correct?

7 A Perhaps.

8 Q Is it accurate to say in this case it probably would have  
9 cost less to move the facilities if it were stretched over a  
10 longer period of time, a few more months, perhaps? You agree  
11 that probably would have cost less?

12 A Perhaps. There are areas that we might have spent more on  
13 to make it more transparent to our customers. There are  
14 areas we would have saved costs on, yes.

15 Q Not perhaps, you probably would have saved costs if you  
16 had more time?

17 A Yes, in some areas.

18 Q Now, I want to talk to you just a second about the  
19 conversation that you had with Mr. Roberts, and you said the  
20 legal team in January. Okay?

21 A Yes.

22 Q I want you to focus on that. Ms. McKinley was part of  
23 that legal team, correct?

24 A Yes.

25 Q Is it true that one of the things she talked about was

1 about the wisdom of having your global logistics tied up in  
2 Germany because of things that might happen in the future?

3 A Can you repeat that, please?

4 Q Sure. Did she talk to you about the wisdom of having your  
5 global logistics tied up in Germany? We will start there.

6 A No.

7 Q Well, did she say that one of the problems of having a  
8 facility in Germany was that there could be future cases  
9 filed in Germany against Microsoft, and that injunctions were  
10 readily granted in Germany?

11 A I don't recall that, no.

12 Q Do you recall her saying that because injunctions are  
13 frequent in patent infringement cases in Germany, if you are  
14 looking to the future you would perhaps want to move out of  
15 Germany because it is just a bad location?

16 A No.

17 Q And if someone had told you that you happened to be  
18 located in a country where 72 percent of the patent cases are  
19 filed, and that the process is quick, and that they  
20 frequently grant injunctions, and that could affect  
21 Microsoft's products, would that cause to you think about  
22 whether or not it was wise to be in Germany?

23 MR. HARRIGAN: Objection. Calls for speculation.

24 THE COURT: I will overrule the objection.

25 THE WITNESS: Can you repeat the question?

1 By Mr. Price:

2 Q Oh, gosh. I wish I had a transcript. If you had been  
3 told that -- you are located in Germany, and two-thirds of  
4 the patent lawsuits were filed in Germany, and that under the  
5 German legal system it is a very quick, efficient system, and  
6 injunctions are often issued against products, and that there  
7 would likely be future cases against Microsoft by other  
8 companies, if you had been told that, would that have  
9 troubled you.

10 A If I had been told that? Yes, it would have troubled me.

11 Q And why would it trouble you if you had been told because  
12 of the location, Germany, and because of the German legal  
13 system and all of these patent suits being filed there and  
14 the injunctions, why would that trouble you?

15 A For the same reasons we would consider making the move  
16 from Germany, the risk of the business being disrupted out of  
17 the only location that would support all of mainland Europe,  
18 Russia, Middle East and Africa.

19 Q Now, concerning Arvato, you did think Arvato in Germany  
20 was charging too much, right?

21 A I always think our suppliers -- we always want to optimize  
22 costs with suppliers. I will always talk that way.

23 Q Well, even under oath you talked that way. You said they  
24 cost too much, correct?

25 A I did.

1 Q And I guess their costs have increased by 300 percent in a  
2 short period of time?

3 A Not in total on our business. There were parts of our  
4 business where they were asking for a 300 percent increase  
5 on, the parts of our business that we ultimately moved.

6 Q When you picked CEVA over Arvato to be the main place to  
7 go -- main company to run the facility in the Netherlands,  
8 was one of the reasons that CEVA had an open book on costs,  
9 that is, they were more transparent on costs?

10 A It was not the primary reason. It was a consideration.  
11 The primary reason was because they were cheaper.

12 Q Always a good reason. Now, let me ask you if you could  
13 look quickly at Exhibit 7136?

14 A 7136?

15 Q Yes. You see that is an e-mail. At the top it is from  
16 Mr. Roberts to Theresa Daly and you, correct?

17 A Yes, it is.

18 MR. PRICE: Your Honor, I would move Exhibit 7136  
19 into evidence.

20 MR. HARRIGAN: It is very tiny print. I need to look  
21 at it first.

22 THE COURT: It is small print, ladies and gentlemen.

23 MR. HARRIGAN: I have no objection to the part I can  
24 read.

25 THE COURT: The exhibit is admitted and may be

1 published.

2 (7136 admitted.)

3 By Mr. Price:

4 Q Let me see if I can make it --

5 THE COURT: Mr. Price, you have the ability to --

6 By Mr. Price:

7 Q Let's go to the top first. This is June 12th, 2002, from  
8 Mr. Roberts. He is your boss?

9 A Yes.

10 Q And could you tell us who Theresa Daly is?

11 A Theresa Daly was the general manager of our European  
12 operations.

13 Q This is an e-mail chain that your boss was involved in,  
14 correct? I mean, obviously he looked at the e-mail below  
15 this, because sent an e-mail saying thanks for sending it,  
16 right?

17 A Yes.

18 Q Let's go down to the bottom then and see if we can blow  
19 this up in pieces. This is Theresa Daly --

20 THE COURT: Counsel, why don't we take a smaller  
21 chunk and blow it up a little bigger?

22 MR. PRICE: We will try.

23 By Mr. Price:

24 Q This is Theresa Daly. That is to a number of leadership  
25 teams. Are you copied on this?

1 A I am not -- I am not on that original mail in any of those  
2 distribution groups -- distribution lists.

3 Q These are large lists?

4 A These are large lists, relatively large. They are going  
5 to our sales and marketing team.

6 Q But you got it when your boss sent it and said thanks for  
7 sending it?

8 A Yes.

9 Q Let's see if we can blow up --

10 A Correction. I got it when Theresa sent it to me.

11 Q That is right above that where it says "FYI" and something  
12 else?

13 A Yes.

14 Q Is that a yes?

15 A Yes.

16 Q And then if we can go down to the bottom of Ms. Daly's  
17 e-mail, and see if we can look at the first sentence --  
18 Let's try that again. "Hi everyone. As a follow-up to my  
19 e-mail below, I wanted to share with you an update on the  
20 change to our main distribution center in Europe. Per my  
21 previous note, we will transition our European distribution  
22 center from Germany to the Netherlands." What I want to  
23 focus on is that second paragraph. It says, "The decision to  
24 move our main distribution center in Europe was made with a  
25 vision for the future. To support growth in our business

1 over the years ahead we need to significantly scale our  
2 distribution footprint and capabilities in EMEA. Transition  
3 of this scale is not easy, and has taken significant effort  
4 and resources to plan and execute. As with any project of  
5 this magnitude, our EMEA distribution and logistics team have  
6 worked to ensure a successful transition, plus a seamless  
7 impact to our customers. However, I would ask you to be  
8 vigilant to any customer feedback from June 1st and feedback  
9 through our EMEA channel operations team." I think we have a  
10 demonstrative on this, if we could put that up. Ken retyped  
11 it. That's better.

12 When you received this on your computer, was this the  
13 size of it?

14 A I'm --

15 Q When you received it on your computer, was it this size?

16 A No.

17 Q So when you received this it was easy to read?

18 A I'm sure, yes.

19 Q And focusing on the, "To support the growth in our  
20 business over the years, we need to significantly scale our  
21 distribution footprint and capabilities in EMEA." Attached  
22 there is some numbers on that, correct?

23 A Correct.

24 Q If we can blow up our demonstrative on that, since we have  
25 the exhibit in evidence. We will show the demonstrative that

1 is legible.

2 What Ms. Daly says in connection with needing more  
3 space and the vision for the future is the German facilities  
4 is 22,000 square meters, and the new facility is 42,000  
5 square meters, correct?

6 A That's what the e-mail says. That wasn't correct.

7 Q It says -- And I will get back to that. It says the  
8 pallet storage space is 21,000 pallet locations versus 40,000  
9 pallet locations in the new Netherlands facility, correct?

10 A Yes.

11 Q And increased pallets means you can store more products?

12 A Yes.

13 Q The production lanes, it says ten dedicated lanes compared  
14 to 20 dedicated lanes. Do you see that?

15 A Yes.

16 Q And that equates to being able to move more products out,  
17 correct?

18 A Yes.

19 Q And then it says, "Loading bays/doors." It went from 14  
20 bays to 38 bays, and then, again, equates to being able to  
21 move out more products, correct?

22 A Correct.

23 Q And you said in response when I asked you about these  
24 figures, that it is not accurate, correct?

25 A Correct.

1 Q And you previously testified to the same thing in your  
2 deposition, that these figures are not accurate, correct?

3 A Yes.

4 Q In fact, you testified that you had never discussed or  
5 reviewed this e-mail, correct?

6 A Either myself or somebody from my team probably did, yes.

7 Q But I'm saying --

8 A I don't recall seeing it at the time.

9 Q When you testified under oath earlier in this case you  
10 denied ever seeing this, correct?

11 A I don't recall, honestly.

12 Q Your Honor, if we can just play from Volume I, July 16 --  
13 May 9, 2013, 150, Line 22 to 151, Line 1.

14 THE COURT: Mr. Harrigan, are you going to respond?

15 MR. PRICE: It is 150, Line 22 to 151, Line 1.

16 MR. HARRIGAN: No objection.

17 THE COURT: You may do so.

18 "Q. Did you discuss this particular e-mail with Ms. Daly  
19 before it was sent?

20 A No.

21 Q Did you review it --

22 A I don't believe so."

23 By Mr. Price:

24 Q In fact, you discussed it with Ms. Daly and you actually  
25 sent her those figures -- those very figures that she

1 published?

2 A I'm certain somebody on my team did, yes.

3 Q If she said you did, you wouldn't have any reason to deny  
4 that, would you?

5 A As I said in my deposition there, I didn't believe I saw  
6 it, but I'm certain that somebody on my team was provided  
7 those figures, yes. Those would only come from me or my  
8 team. Theresa wouldn't make that up.

9 Q In addition to the figures that you provided, what also  
10 was provided was a bunch of photographs showing the facility,  
11 correct?

12 A Yes.

13 MR. PRICE: No further questions.

14 REDIRECT EXAMINATION

15 By Mr. Harrigan:

16 Q Did the move have -- did the move of the distribution  
17 facility have any impact at all on Microsoft's customers or  
18 anything they had to do because of it?

19 MR. PRICE: Object. Beyond the scope of the cross,  
20 your Honor.

21 THE COURT: I will permit the question.

22 THE WITNESS: Yeah, our customers had to do plenty of  
23 things. I mean, during the transition it was pretty rocky,  
24 and so there were some escalations due to late shipments and  
25 things like that. In preparation for the move they needed to

1 make changes in their systems as well, things like  
2 replenishment lead time, so that they would trigger an order  
3 at the right time because the lead time from Duren would be  
4 different from the lead time from Venray. So they needed to  
5 make changes in their systems to account for lead time  
6 changes.

7 By Mr. Harrigan:

8 Q Did Ms. Daly have anything to do with customer relations?

9 A Yes.

10 Q And so in this e-mail she is pointing out some benefits,  
11 or what she believes to be benefits, of the new facility?

12 A Yes.

13 Q One of those relates -- There was the discussion that we  
14 just heard about increase in pallets, and there was also a  
15 discussion about the increase in size. Please explain to the  
16 jury to what extent either of those was actually an advantage  
17 from the standpoint of a distribution manager.

18 A Well, I mean from a distribution perspective, it provided  
19 more capacity. Yeah, it basically would provide more  
20 capacity.

21 Q And was the capacity at Duren adequate?

22 A The capacity at Duren was adequate. I mean, Duren was  
23 what we called a shared location. So the two facilities,  
24 Duren and Venray, were very comparable in size as far as  
25 overall square footage. The number of doors would be -- the

1      Netherlands would be 38 or 40, and the Duren location  
2      actually would have been 32, as an example. Now, within that  
3      facility it was shared and we occupied a portion of that  
4      facility. We were allocated somewhere around 31,000 square  
5      meters, up to 25,000 pallets, and we would flex to 35,000.  
6      So within the facility we could scale, absolutely, to a level  
7      that we can scale today in Venray.

8      Q     So from the scaling potential, how do they compare?

9      A     Pretty much identical.

10     Q    How do you know this table in the e-mail is not correct?

11     A    Well, I think actually the heading on the current German  
12     facility is simply wrong. That would be probably more  
13     representative of what we would have been using at the  
14     time -- actually using at the time, meaning our business.  
15     Sometimes it is what I call high tide, where the volume is  
16     increased because of a particular season, and sometimes it is  
17     lower. Business is pretty seasonal. And so this would have  
18     been a low tide in the business. So that would probably  
19     represent what we were using about that time.

20     Q    So it appears to you to be utilization rather than  
21     absolute size?

22     A    Yes.

23     Q    What is the size of the Duren facility today?

24     A    The Duren facility has actually been built out and  
25     expanded to roughly 700-, 750,000 square feet today.

1                   MR. HARRIGAN: No further questions.

2                   MR. PRICE: I don't have the time to spend it with  
3 this witness. I would love to. Thank you.

4                   THE COURT: You just need to say you don't have any  
5 questions.

6                   MR. PRICE: I don't have any questions. Thank you.

7                   THE COURT: You may step down, sir. Does Microsoft  
8 have another witness?

9                   MS. ROBBINS: Your Honor, our next witness would be  
10 Brian Blasius by deposition.

11                  THE COURT: All right.

12                  MS. ROBBINS: We have a video prepared.

13                  THE COURT: It will be by deposition read or --

14                  MS. ROBBINS: Deposition video. The total time is  
15 approximately 20 minutes for both sides' designations.

16                  THE COURT: Does someone have the transcript that  
17 they can give me? Ladies and gentlemen, we are probably not  
18 going to get to start this before lunch. But remember when  
19 we were talking yesterday, we had a woman come in and pretend  
20 to be someone and read the answers. There is another  
21 alternative in these depositions. That alternative is to  
22 videotape it. And there are rules about the camera can only  
23 be on one person and it can't be a Hollywood production. It  
24 is a way for you, as you have seen from some of the other  
25 snippets that have been played, to present the testimony of

1 the deposition. So it is the same thing, questions and  
2 answers, but you will see a videotape of it. And that's what  
3 we are going to get when we get back from lunch. Apparently  
4 it will be about 20 minutes long. I will give you an  
5 additional two minutes for lunch.

6 I haven't read this for a while. And so before you go:  
7 Remember, until the trial is over do not discuss the this  
8 case with anyone, including your fellow jurors, members of  
9 your family, people involved in the trial or anyone else, and  
10 don't allow anyone to discuss the case with you. This  
11 includes discussing the case in internet chat rooms or  
12 through internet blogs, internet bulletin boards, e-mails or  
13 text messaging. If anyone tries to communicate with you  
14 about the case, please let me know about it immediately. Do  
15 not read, watch or listen to any news reports or other  
16 accounts. Don't do any research, such as consulting  
17 dictionaries, searching the internet or using other reference  
18 materials. And, finally, keep an open mind until all of the  
19 evidence has been presented and you have heard the arguments  
20 of counsel, my instructions of the law and the views of your  
21 fellow jurors.

22 To make that even more palatable, we are going to quit  
23 today at 4:00, as opposed to 4:30. The reason is that I am  
24 going to be meeting with the lawyers in what we call an  
25 informal instructions conference. We are going to talk about

1 the jury instructions that the court has drafted. I am going  
2 to get their wisdom as to what I got right and what I got  
3 wrong. So that I don't keep the court staff forever, we will  
4 do that at 4:00 as opposed to starting at 4:30. That means  
5 you can go home at 4:00. You can plan accordingly if you  
6 need to make any phone calls or whatever at lunch.

7 Ladies and gentlemen, please, rise for the jury. We will  
8 be in recess until 1:30.

9 (The proceedings recessed.)

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## AFTERNOON SESSION

3 THE COURT: I'm not sure who signed this on behalf of

21 MS. SULLIVAN: Thank you, Your Honor.

22 THE COURT: All right. Let's bring the jury in and  
23 we're going to --

24 MR. HARRIGAN: Your Honor, just two quick ones -- I  
25 think quick -- if I may. First of all, I forgot to offer

1       6394, the last exhibit with Mr. Davidson.

2           MR. PRICE: No objection.

3           THE COURT: 6394 is admitted.

4           (Exhibit No. 6394 was admitted into evidence.)

5           MR. HARRIGAN: And then I just wanted to advise the  
6 court that we are planning to defer our FTC witness pending  
7 the court's ruling on the matter that was the subject of the  
8 briefs filed earlier today. And if the FTC -- the letter to  
9 the FTC does not come into evidence, then we think that issue  
10 will become moot, at least as the record currently stands,  
11 although we don't know what else Motorola may do that would  
12 raise that question.

13           So we're going to defer the witness.

14           THE COURT: I will tell you, if I understand what  
15 Mr. Price did this morning, he didn't ask Mr. Gutierrez about  
16 the letter. And therefore right now I don't think the FTC is  
17 relevant to this trial.

18           MR. PRICE: Your Honor, I didn't, because Mr. Heiner  
19 will come in, and he actually wrote the letter, or signed it.

20           THE COURT: Okay. So it just got postponed.

21           MR. PRICE: And if Microsoft does not call him, we  
22 are putting them on notice now that we want to call him  
23 tomorrow, if they rest their case.

24           MR. HARRIGAN: Basically, Your Honor, all we're  
25 saying is if the letter that Mr. Heiner wrote is not coming

1       in, then we believe this issue will be moot. If it is, then  
2       the issue is not moot.

3                 THE COURT: All right.

4                 MR. PRICE: The issue is not moot, Your Honor.

5                 MR. CANNON: Your Honor, the next live witness will  
6       be Dr. Murphy. And so we had one small objection to one of  
7       the demonstratives. I'm not sure if you want to take that up  
8       now or after the deposition is played.

9                 THE COURT: Yes, please do.

10                MR. CANNON: May I approach?

11                THE COURT: Yes. Is this Dr. Murphy the Irishman  
12       from the last trial? The person who refers to Judge Posner  
13       by his first name?

14                MR. CANNON: Well, he says he's Irish, but --

15                THE COURT: Go ahead, Mr. Cannon.

16                MR. CANNON: So, Your Honor, Professor Murphy wants  
17       to use as demonstrative a section of this court's preliminary  
18       Jury Instruction No. 2 and label it as such. And, Your  
19       Honor, I think this gives too much weight to one portion of  
20       the court's preliminary instruction which the court read in  
21       its entirety to the jury and then did not give to the jury to  
22       take back with them. And the court will prepare and read  
23       final instructions when this case is done, and I think those  
24       final instructions will be the legal standard against which  
25       the jury will weigh the evidence.

1       And, in addition, this preliminary instruction is not in  
2 his report because it didn't exist at the time of his report.  
3 So we've reached agreement on the other demonstrative, but  
4 this one, Your Honor, we think it should not go up.

5           THE COURT: Who has looked at the findings and  
6 conclusions with such a fine eye that they can tell me if  
7 that's a direct quote out of the findings and conclusions?

8           MR. HARRIGAN: I believe it is not, Your Honor. I  
9 actually just closed the document where I had your findings.  
10 But I don't think the preliminary instruction is a quote.

11          THE COURT: I'm going to allow the testimony. I'm  
12 not going to allow the demonstrative. It seems to me that it  
13 does suggest that -- it was used as a preliminary jury  
14 instruction, but we tried to keep in mind that it's all of  
15 the evidence that they're going to hear, and I think that  
16 calls it out a bit too much. But the underlying testimony,  
17 that's fine. Mr. Cannon, anything else?

18          MR. CANNON: Nothing Your Honor. Thank you.

19          THE COURT: Let's bring the jury in.

20          (The following occurred in the presence of the jury.)

21          THE COURT: Microsoft will call its next witness.

22          MS. ROBBINS: Microsoft calls Brian Blasius by  
23 deposition.

24          THE COURT: Thank you.

25          (The following are excerpts from a video deposition.)

BRIAN BLASIUS

Having been sworn under oath, testified as follows:

## **EXAMINATION**

BY MR. PRITIKIN:

Q Good morning, Mr. Blasius. Could you please state your name for the record?

A Brian Blasius.

0 By whom are you currently employed?

A Google.

Q And what's your position at Google?

## A Patent licensing manager.

Q I'm going to hand you what has been marked as Blasius Deposition Exhibits 1 and 2. If you could take a look at those, please. You see Exhibit 1 is a Rule 3(b)(6) notice of deposition of Motorola?

A Yes.

Q And if you would turn to the deposition topics on the last page. Are you testifying today as a corporate representative of Motorola with respect to the two topics listed there?

A Yes.

Q Could you turn to Exhibit 2? And do you see that these are Motorola Mobility's Second Supplemental Responses to Plaintiff Microsoft's First Set of Interrogatories Nos. 1, 2 and 4?

A Yes.

1 Q And if you turn back to the deposition topics, Topic 2, do  
2 you see that it references: Offers made to and negotiations,  
3 discussions, and licenses with the parties identified in this  
4 document that has been marked as Exhibit 2?

5 A Yes.

6 Q And are you prepared to testify about these offers,  
7 negotiations, discussions, and licenses?

8 A Yes.

9 Q Did you talk to Kirk Dailey?

10 A I did briefly talk with Kirk Dailey, yes.

11 Q About the subject of the 30(b)(6) topics?

12 A Yes.

13 Q Did there come a time when you became involved in the  
14 licensing of patents or other intellectual property?

15 A Yes.

16 Q When was that?

17 A 2007.

18 Q Have your responsibilities changed since 2007?

19 A I've taken on additional licensing responsibilities within  
20 the organization, but, in general, its been since 2007 at a  
21 high level generally licensing Motorola's intellectual  
22 property, and then that has changed with the movement to  
23 Google.

24 Q Now, let's go back to the fall of 2010. What was your job  
25 title at that time?

1 A Director of intellectual property licensing.

2 Q To whom did you report?

3 A Kirk Dailey.

4 Q Who determined what royalty rates would be offered to  
5 particular prospective licensees?

6 A The ultimate decision was made by Kirk Dailey.

7 Q Now, before reaching out to a prospective licensee, did  
8 someone in your group or elsewhere at Motorola try to develop  
9 an understanding of what the products were, how the  
10 technology that required a license was being used in the  
11 products?

12 A It depends on the level of -- it depends on the type of  
13 technology. If, for example, somebody was using a particular  
14 standard and a product was compliant with a particular  
15 standard, and we had patents that read on that standard, we  
16 would enter into negotiations with the particular company if  
17 that was on our prioritization list.

18 Q Did you generally make an attempt to determine how the  
19 standard was being used in the product or the importance of  
20 the standard to the product?

21 A No. We would enter into discussions. And through the  
22 course of those discussions with the particular third party,  
23 we may get additional information to help understand what you  
24 described.

25 Q Which portfolio of essential patents have you been

1 involved in licensing?

2 A The cellular standards which would include GSM, TDMA,  
3 CDMA, 3G, various elements of 3G, 4G, as well as 802.11 and  
4 H.264.

5 Q Are those the only ones?

6 A We also would -- those were the ones that were always the  
7 areas of focus in our discussions.

8 Q And you said a minute ago that the -- your rate for any of  
9 them was 2.25 percent?

10 A Yes.

11 Q Was an analysis ever done at Motorola to determine whether  
12 2.25 percent was the appropriate royalty for each of the  
13 portfolios?

14 A That was the rate that we had set through our licensing  
15 history.

16 Q Well, to your knowledge, did Motorola ever sue someone for  
17 infringing its standards-essential patents before making a  
18 license offer to them?

19 A Not that I'm aware of.

20 Q Did you understand that you were not permitted to demand  
21 unreasonably high royalties?

22 A I understand that from the definition of FRAND that we  
23 agreed to license our patents on fair, reasonable, and in a  
24 non-discriminatory fashion.

25 Q And that meant you couldn't ask for unreasonably high

1       royalties, right?

2       A    It's my understanding is -- well, the opposite of  
3       reasonable is unreasonable. So as you -- if you're  
4       characterizing it in that way, then the commitment we made  
5       that it had to be reasonable and with respect to a RAND  
6       principle.

7       Q    Did you think you were allowed to ask for unreasonably  
8       high royalties?

9       A    No.

10      Q    Did you take into account, in picking out this  
11       2.25 percent, that there were other companies that might also  
12       demand 2.25 percent?

13      A    That rate has been negotiated for 20 years with companies  
14       that had patents. And that rate sometimes is less than  
15       2.25 percent based off of the negotiation facts. It's not a  
16       take-it-or-leave-it rate. It's our starting rate. We enter  
17       into those negotiations, and companies enter into  
18       cross-licenses, and may trade value each way. So we  
19       understood that there were other patents out there and have  
20       never had a problem with that before.

21      Q    But in starting with the 2.25 percent as your royalty for  
22       the 802.11 patents, is it correct that you did not take into  
23       account the relative strength or weakness of your patents as  
24       compared to those of other companies?

25      A    I don't recall that being taken into account.

1 Q If, in fact, there are 92 companies that have 802.11  
2 essential patents and each of them received 2.25 percent, the  
3 combined royalty would be 207 percent. Do you think that is  
4 a reasonable royalty to be able to implement 802.11  
5 technology?

6 A Under your hypothetical, you know, situation that you  
7 described, it doesn't appear that that would be a viable  
8 business plan. You would pay more royalties than what you  
9 actually sold the product for. That's a hypothetical that  
10 I've never heard exist in the marketplace in reality.

11 Q Now, if each of the 52 companies that filed a Letter of  
12 Assurance with respect to the H.264 standards-essential  
13 patents obtained a royalty of 2.25 percent of the product  
14 price, the total H.264 royalty for all companies would have  
15 amounted to 117 percent of the product price, right?

16 A So, under that hypothetical, again, it's difficult to  
17 understand which patents are actually essential and who has  
18 what patents and what their rates are. But under that  
19 hypothetical, I haven't done the math, but it seems to add  
20 up.

21 Q And would you consider a total combined royalty of  
22 117 percent of the product price to implement H.264 to be  
23 reasonable?

24 A So under that hypothetical, if people were actually paying  
25 that amount, I don't -- it doesn't seem like a viable

1 business. But, again, it's a hypothetical that I don't  
2 believe exists in the marketplace. I've never heard of that  
3 actually happening in reality.

4 Q Have you ever had occasion to look at the royalty rates  
5 that are charged by patent pools?

6 A Yes.

7 Q And which pools have you had occasion to look at?

8 A I've seen cellular pools that used to be called the 3GL.  
9 It was a 3G patent pool. I have seen the MPEG LA patent  
10 pools for audio and video codecs. I have seen the 802.11 Via  
11 patent pool. There may have been a few others. I can't  
12 recall right now.

13 Q Now, were you also aware of the rates charged by the  
14 802.11 -- the Via 802.11 pool?

15 A Yes.

16 Q And when did you become aware of those?

17 A I can't recall the exact date, but probably in the 2009,  
18 2010 timeframe.

19 Q And how did it happen that you became aware of the Via  
20 802.11 pool rates?

21 A They were asking if we wanted to become a member of the  
22 pool.

23 Q And did somebody ask you to look into it?

24 A Yes.

25 Q Who?

1 A Kirk Dailey.

2 Q Did you communicate what the rates were for the Via 802.11  
3 pool to Mr. Dailey?

4 A I'm sure I've had communications with him on that and had  
5 made him aware of those rates.

6 Q Now, do you understand -- what is your understanding as to  
7 whether it is consistent with RAND obligations for a patent  
8 owner to condition a license to its standards-essential  
9 patents on a grant-back of rights to non-standards-essential  
10 patents of the licensee?

11 A So we have not -- you're asking for what my understanding  
12 is for the RAND equipment, or RAND?

13 Q Yes.

14 A It would depend on a particular IPR policy, but the way we  
15 have licensed our standards-essential patents, we have always  
16 conditioned the grant-back to the particular standard getting  
17 licensed and never required a grant-back to non-essential  
18 patents as part of the license.

19 Q And so take in the case of 802.11 essential patents, you  
20 would condition the license on a grant-back of 802.11  
21 essential patents but would not condition it on a grant-back  
22 of other non-essential patents, correct?

23 A Correct.

24 Q And the same would be true of H.264?

25 A Correct.

1 Q And is the reason for that, that you believe that  
2 requiring a grant-back of non-essential patents is  
3 inconsistent with your RAND commitments?

4 A I don't know if it's inconsistent with the RAND  
5 commitment. It's just been a practice of ours for as long as  
6 I can remember.

7 THE COURT: Does that conclude it?

8 MS. ROBBINS: Yes, Your Honor, that concludes our  
9 portion. And we'd like to move into evidence trial exhibits  
10 6047 and 6048 that were referenced in the designated  
11 deposition testimony.

12 MR. CANNON: No objection.

13 THE COURT: They are admitted.

14 (Exhibit Nos. 6047 & 6048 was admitted into evidence.)

15 THE COURT: All right. Is Microsoft ready to call  
16 its next witness?

17 MR. PRITIKIN: We are, Your Honor. As our next  
18 witness we call Professor Kevin Murphy.

19 KEVIN MURPHY

20 Having been sworn under oath, testified as follows:

21 THE CLERK: Take the stand, please. Will you state  
22 your name for the record, please.

23 THE WITNESS: Kevin M. Murphy.

24 MR. PRITIKIN: Your Honor, may we approach and hand  
25 out some binders?

1                   THE COURT: Yes.

2                   DIRECT EXAMINATION

3 BY MR. PRITIKIN:

4 Q Professor Murphy, before we get into the substance of your  
5 testimony in this case, I'd like to go over your background,  
6 briefly. Are you on the faculty of a university?

7 A Yes. I'm a professor at the University of Chicago.

8 Q And what is your title there, sir?

9 A I am the George J. Stigler Distinguished Service Professor  
10 of Economics in the department of economics and the graduate  
11 school, in the Booth school of business.

12 Q What kinds of classes do you teach?

13 A I teach Ph.D. level and MBA-level classes in the two  
14 departments in microeconomics, labor economics, the economics  
15 of public-policy issues, advanced economics, a variety of  
16 areas.

17 Q And, in general, what are your teaching and research  
18 focused on?

19 A In a broad level, I focus on the application of economics  
20 to real-world problems, and the integration of the tools of  
21 economics and data to understand business and other outcomes.

22 Q Do any of the classes you teach deal with the economics of  
23 intellectual property, like patents?

24 A Yes, they do. That comes up in my Ph.D.-level micro  
25 class. It also comes up in my public-policy class, as well

1 as my advanced micro class. "Micro" means microeconomics.

2 Q What are your college and graduate degrees and where are  
3 they from?

4 A I have a BA in economics from UCLA, and a Ph.D. in  
5 economics from the University of Chicago.

6 Q Approximately how many articles and books have you  
7 published in the field of economics?

8 A I have somewhere like 65 or 70 articles, and two books.

9 Q And, in general, what subjects have they touched on?

10 A Pretty wide area. I've done a lot of work in labor  
11 economics, a lot of work in growth and development. I've  
12 done a fair amount of work in health. I've done work on  
13 environmental economics, intellectual property, just a wide  
14 range of areas in economics.

15 Q Could you take a look at the exhibit binder that you have  
16 and turn, please, to 6106. And can you identify this as a  
17 copy of your curriculum vitae?

18 A Yes, it does appear to be a copy of my curriculum vitae.

19 Q And is that your resume'?

20 A Yeah. That's what we call a resume' in academics.

21 MR. PRITIKIN: We would move admission of  
22 Exhibit 6106, Your Honor.

23 MR. PRICE: Object. It's hearsay.

24 THE COURT: Overruled.

25 (Exhibit No. 6106 was admitted into evidence.)

1 Q Have you received any academic or other awards for your  
2 work?

3 A Yes. In 1997 I was awarded the John Bates Clark medal,  
4 which at the time was awarded every other year to the  
5 outstanding American economist under the age of 40. I wish I  
6 was still under the age of 40. But I'm not. I also won the  
7 Arrow prize for a paper I published in Health Economics, the  
8 Garfield prize for a different paper in Health Economics.  
9 And I also was awarded a MacArthur Fellowship.

10 Q What year was that?

11 A Oh, I don't know, about seven or eight years ago,  
12 something like that.

13 Q What is a MacArthur Fellowship?

14 A A MacArthur Fellowship is a fellowship that's given across  
15 a wide-range of areas and it gives you five years of support  
16 for whatever your endeavor is. And they're intended for  
17 people that have a lot of promise for the work in the areas  
18 they're working.

19 Q Are they sometimes referred to as "genius grants"?

20 A Yeah, sometimes people call them that. I don't refer to  
21 them that way.

22 Q Apart from your work at the University of Chicago, do you  
23 have any other positions?

24 A Yes. I'm a senior consultant to Charles River and  
25 Associates, usually abbreviated CRA, which is a company that

1 specializes in providing economic analysis and economic  
2 consulting on legal, regulatory matters.

3 Q Have you done consulting work in the past for Microsoft?

4 A Yes, I have.

5 Q And what types of matters have you consulted on for them,  
6 before this case?

7 A Yeah, generally it's been on antitrust matters.

8 Q Prior to the various disputes that Microsoft has had with  
9 Motorola -- let's put those to one side for a moment -- how  
10 many times have you testified in court on behalf of  
11 Microsoft?

12 A Four times, I believe.

13 Q And were those antitrust cases?

14 A Yes, they were antitrust cases.

15 Q Over the last five years, what percentage of your  
16 consulting work has been for Microsoft?

17 A I would say less than ten percent.

18 Q Now, in the trial that was held in this courtroom last  
19 fall to determine the RAND rate, did you testify?

20 A Yes, I did.

21 Q And approximately how long have you been working on the  
22 RAND issues that are involved in this case?

23 A For about two years now.

24 Q How many hours do you think you've spent analyzing those  
25 issues?

1 A Several hundred hours, a couple hundred hours.

2 Q And prior to this case, what consulting experience have  
3 you had involving the economics of intellectual property and  
4 patents?

5 A I've done some patent-valuation work in various consulting  
6 matters. I also do -- I have an ongoing relationship with  
7 ASCAP, which is the American Society of Composers, Artists  
8 and Producers, that license music works to be used by radio,  
9 television, just any place you see a public performance,  
10 basically. So I work with them on their licensing. I  
11 provide economic background and analysis to help them in  
12 setting their rates, as well as work with them on any  
13 disputes they have with people over those rates.

14 Q Now, turning to this matter, Professor Murphy, what were  
15 you asked to do?

16 A I was asked to examine Motorola's conduct in this case  
17 from an economic perspective, and asked whether that conduct  
18 was more consistent with them seeking to license their  
19 standards-essential patents on RAND terms or more consistent  
20 with an attempt to hold Microsoft up for the value of the  
21 standards.

22 Q And what conduct did you consider?

23 A I considered a wide-range of their conduct, from the  
24 letters they sent out, to their behavior regarding  
25 injunctions, to the continuing positions that they took over

1 time. So it was kind of an analysis that combined all those  
2 things together.

3 Q And I don't want to spend a lot of time on this, but can  
4 you tell us, briefly, what kinds of materials you looked at  
5 along the way?

6 A Yeah. In order to do that, I had to first go back and go  
7 through the economic literature and the economic analysis of  
8 standards-essential patents, understand standard setting in  
9 general, the problems with hold-up and royalty stacking,  
10 those kinds of issues. So understand the economic  
11 background. I also analyzed deposition testimony, documents,  
12 went through a number of license agreements. So, it was kind  
13 of put together, both the economic side of things together  
14 with facts from the case, to try to do an overall economic  
15 analysis of their behavior.

16 Q What conclusion did you reach?

17 A I reached the conclusion that their behavior, taken as a  
18 whole, was far more consistent with Motorola looking to  
19 engage in hold-up, and hold up Microsoft for the value of  
20 using the standards, than it was with Motorola attempting to  
21 negotiate a license on RAND terms.

22 Q All right. Let's start with some of the economic issues  
23 that arise in connection with standards and  
24 standards-essential patents. Can you tell the jury, what is  
25 an interoperability standard?

1 A An interoperability standard is a standard that defines  
2 the way different pieces of equipment, or equipment and  
3 software, work with each other. Kind of a simple example you  
4 could think of that's too simple, but I think it illustrates  
5 the point, think about the common plug that you plug an  
6 appliance into the wall. There's a socket that has a  
7 particular shape and there's a plug that has a particular  
8 form, that fit together so that I can plug a toaster or radio  
9 or my computer, whatever, all into the same socket.

10 And, in order to have that happen and work well, we all  
11 have to agree on what it is. You can't have every different  
12 piece of equipment have a different plug, because then I'd  
13 have to have all these different plugs in my house.

14 And, in fact, the exact shape of the plug doesn't really  
15 matter. What really matters is that we all agree on what the  
16 shape is. So if you have ever traveled to Europe, you'll  
17 notice they have a different plug, and all their appliances  
18 use those plugs. So a standard is mostly about agreeing.  
19 Now, that's a simple example where it doesn't really matter  
20 whether we choose round plugs or square plugs or whatever.  
21 We just all have to do the same.

22 So, part of what a standard does is reach that agreement  
23 over how we're going to do things, choosing method among many  
24 available options, often.

25 Q Now, are both of the standards that are at issue in this

1 case, 802.11 and H.264, interoperability standards?

2 A Yes, they are. Let's just take 802.11. 802.11, I think  
3 you and I all know it as WiFi. It's the standard that  
4 governs how my computer or my cell phone, or nowadays my TV,  
5 will talk to the wireless network in my house. But I also  
6 want my laptop to be able to connect to the wireless network  
7 at the coffee shop if I take it down there. So that's the  
8 element of interoperability we need. It's like making sure  
9 my plug will plug into anybody's outlets.

10 Q From an economic perspective, are there benefits to the  
11 public and to companies in having standards of this type?

12 A Oh, yes, tremendous benefits in that, again, I can use my  
13 laptop and all the other devices with the same network. I  
14 don't have to have a different network for each device. And  
15 I also don't have to have different devices for different  
16 places. I can use the same wireless communication protocol,  
17 whether I'm using it at home or using it at the coffee shop  
18 or on an airplane these days, or in the shopping mall or at  
19 Starbucks or wherever else I want to go.

20 Q How important are the particular design choices that are  
21 made and selected for interoperability standards?

22 A Well, you know, how you choose is probably more important  
23 than it is for the plug, that there is some differences  
24 across. But still a lot of value is created by having a  
25 standard, so that we can use the same laptop or the same

1 device in many different ways.

2 Q Let's put up PDX 25.

3 Is this an illustration --

4 THE COURT: Counsel, is this intended as a  
5 demonstrative?

6 MR. PRITIKIN: Yes, sir.

7 THE COURT: Has the other side seen this?

8 MR. PRICE: No objection as to the demonstrative.

9 THE COURT: All right. Ladies and gentlemen, once  
10 again, this is a demonstrative to help you understand the  
11 witness's testimony.

12 Q Is this an illustration that you prepared to help explain  
13 some of the concepts surrounding these types of standards?

14 A Yes, it is.

15 Q And let's start on the left side of the illustration.  
16 What is shown there?

17 A It's trying to depict like how you go about getting to a  
18 standard and creating something like an interoperability  
19 standard. So the basic idea is you might have some  
20 unpatented technology. And it might be some existing ways of  
21 doing things that's not covered by patents. And most of  
22 these standards will have unpatented technology in it.

23 You also could bring in some patented technology. And  
24 that's kind of where the issue is today. The standard is not  
25 only going to have unpatented elements to it, it's going to

1 have patented. Then we talk about the consensus, that's in  
2 the middle, that's where we decide, okay, we're going to use  
3 this element of patented technology, this element of  
4 unpatented technology, and that's going to become our  
5 standard. The shape of our plug. That's going to define how  
6 all of these devices are going to talk to each other.

7 Then once we have that consensus, what really makes the  
8 standard valuable is that a bunch of people adopt it.  
9 Because if you just had the standard and nobody had the  
10 corresponding devices, it really wouldn't be worth much. So  
11 what you really want is -- this is what we call widespread  
12 adoption. I think when you heard earlier the role of RAND  
13 was to create widespread adoption, this is what we were  
14 talking about. We want lots of places -- my house, the  
15 coffee shop, the office building, the airplane -- we want all  
16 these places to have places where I can plug in -- really  
17 wirelessly plug in. And I want all the different devices to  
18 be able to connect, whether it's a cell phone or laptop, or  
19 nowadays my television set even connects by WiFi.

20 So that's the idea. And the value that you have doesn't  
21 come just from any one piece, it comes from that whole system  
22 and the ability to work together, forwarded by the standard.

23 Q Now let's focus on the patented technology portion of it  
24 for a moment. For a standard like 802.11, how many  
25 standards-essential patents are potentially implicated?

1 A There would be lots. Hundreds, even thousands of patents  
2 in some of these standards, that people would claim were  
3 standard. I only put five down here in my picture, but that  
4 still makes the point. I've got my five patent holders down  
5 here, who are five of very many who are contributing that  
6 patented technology that goes into the standard.

7 Q Now, does the widespread adoption of the standard have any  
8 effect on what a patent owner can demand for the use of a  
9 patent that is essential to the standard?

10 A Absolutely. And this is really where the whole hold-up  
11 concept -- I know people have been asking about hold-up.  
12 This is where the hold-up concept comes from. So, let's say  
13 I'm the fifth guy in line here and I have my patent, and I go  
14 to somebody who wants to use my patent to create a product  
15 and I say, no, you can't create your product unless you get a  
16 license from me. The question is, what does he lose if he  
17 doesn't sign the license with me? Well, he doesn't just lose  
18 access to my patent, he loses access to the standard, because  
19 he won't be able to connect to all those other patents. He  
20 can't connect to that unpatented technology. And, also, he  
21 loses the ability to interconnect with all those other people  
22 out there who have also created devices.

23 He's not going to be able to create a wireless product  
24 that will connect up, say, to that wireless network. Or he  
25 won't be able to play the videos that are out there on the

1       web if those are the videos that are out there in the  
2       standard format.

3           So, he doesn't just lose my patented technology, he loses  
4       access to the standard. That's what creates the potential  
5       for hold-up is that I have the ability to deny them access.  
6       So maybe my patent is only worth a penny, but the value of  
7       the whole system to him is \$10. Well, I can hold him up for  
8       that \$10, because if he doesn't get my license he loses out,  
9       not just on my penny's worth of value, he loses out on the  
10      whole \$10. That's the essence of the hold-up problem.

11       Q     Now, when a standard becomes widely used, how does that  
12       affect the ability of the owners of standards-essential  
13       patents to gain leverage?

14       A     Well, what it does is it extends the hold-up problem from  
15       just losing out on the standard to losing out on the  
16       interconnection with all the other devices out there. So if  
17       there are a hundred devices out there, I lose the ability to  
18       communicate with a hundred devices. If there's a thousand  
19       devices, I lose the ability to connect with a thousand. If  
20       there's a million, I lose the ability to connect with a  
21       million. So the more stuff that is out there, the more I can  
22       potentially be held up for.

23       Q     How does this compare to the situation with patents that  
24       aren't essential patents? Could you explain that, the  
25       difference?

1 A I mean, often with non-essential patents you're not in  
2 that same situation where there's a standard that you need to  
3 comply with to communicate with everybody else. You often  
4 are more likely to have a work-around. Because why do we  
5 have standards? We have standards in the cases where it's  
6 important so everybody does things the same way. So this  
7 hold-up potential is going to be much more important in the  
8 standard context, because that's why we had a standard. We  
9 had a standard in the first place because we needed  
10 interconnection. That's kind of the idea.

11 Q Now there's been quite a bit of testimony in the course of  
12 these proceedings about injunctions. Can you explain what,  
13 if any, bearing injunctions or threats of injunctions have on  
14 the risk of hold-up?

15 A Well, I think injunctions fit right into the story, right?  
16 Because if you get an injunction on somebody's product, you  
17 say you cannot import the Xbox into the country or you can't  
18 sell Windows, you're not just enjoining the use of your  
19 patent, you're enjoining them from using this entire  
20 standard. So just like we said, the ability to deny people  
21 access to the standard creates the hold-up problem. The  
22 injunction is simply a way of bringing that about, because  
23 the injunction is not simply, effectively against using the  
24 patent. Technically it's against using the patent, but  
25 because that patent is part of the standard, you can deny

1 people access to the standard and maybe even deny them the  
2 ability to sell their products until they can take this  
3 feature out. But taking the feature out is going to make  
4 your product really unattractive if this is a widely-adopted  
5 standard.

6 Q Does an injunction or the threat of an injunction have any  
7 bearing on what the patent owner can extract?

8 A Yeah. In my example before where the patent was worth a  
9 penny, but being able to be part of the network or comply  
10 with the standard that's worth \$10, in principle he could  
11 demand up to \$10, because that's what you lose if you don't  
12 get the license.

13 Q Now, can you explain this in the context of the Microsoft  
14 products that are at issue in this case?

15 A Yeah. In the context of the Microsoft products, we have  
16 the Xbox console which uses both the H.264 and 802.11  
17 technologies. So the injunction sought there would have  
18 blocked the sale of Xbox unless you remove those  
19 functionalities. But I think, as Mr. Gutierrez talked about  
20 yesterday, removing those technologies is really kind of  
21 suicide from a business standpoint, because complying with  
22 the standard is essential.

23 For Windows you're removing H.264 technology, which is  
24 important to Windows, that Windows wants to play video. But,  
25 again, it's the value of the standard that they can hold you

1 up for, not necessarily just the value of their individual  
2 contribution.

3 Q What is the effect of hold-up on consumers?

4 A Well, consumers are going to lose out in several potential  
5 ways. One is if the products aren't available, that's not  
6 good. If the products aren't compatible, that's not good.  
7 And if they end up coming to the hold-up and paying higher  
8 royalties, that's going to ultimately lend to higher prices.  
9 So there's lots of ways consumers could lose out.

10 Q What is the effect of hold-up on the standards themselves?

11 A Well, the effect of hold-up doesn't just hurt the person  
12 who wanted the license, it also hurts the other patent  
13 holders, because those other patent holders aren't going to  
14 sell as many units of the product. The standard is not going  
15 to be as widely adopted. So, when somebody holds up  
16 customers or users of the standard, they hold up them, they  
17 end up holding up consumers to some extent, they hold up the  
18 other providers of patents and other technology. So there's  
19 pretty widespread implication of that.

20 Q Now, on the demonstrative you prepared I think you've said  
21 you have five patent holders here. How does the number of  
22 patent owners, owners of standards-essential patents, affect  
23 the problem of hold-up?

24 A It basically multiplies it. So if one guy demands an  
25 excessive royalty, well then if you have five guys, well

1       that's five times as bad in terms of the effects on prices  
2       and effect on the cost of implementing the standard. If you  
3       have 50, that's an even worse situation. So the more people  
4       you have, the more hold-up potential and aggregate exists.  
5       And, again, that's often called the royalty-stacking problem.

6       Q      Now we've heard testimony about royalty stacking. Can you  
7       explain to the jury what royalty stacking is?

8       A      Well, royalty stacking simply reflects the fact that if  
9       there are multiple patents that I have to get to practice the  
10       standard, potentially I might have to pay for each of those,  
11       right? Because if I want to do the standard, I need to pay  
12       guys 1, 2, 3, 4 and 5, if they're asking for royalties. So  
13       I'm going to have to pay multiple people. That's the concept  
14       of stacking.

15           And stacking really interacts very closely with hold-up.  
16           Because if one guy holds you up and is able to collect a lot  
17       of money, what do you think those other guys will want to do?  
18           They're not going to stand there passively and say, oh, we'll  
19       let him get his billion dollars, I don't want mine. He's  
20       going to ask for his, too. And if you let that go, it's  
21       going to add up -- even if the first one wasn't so bad --  
22       it's going to add up to a lot. That's the stacking issue.

23       Q      And does the concept of royalty stacking have any bearing  
24       on what the owner of an individual patent should be entitled  
25       to?

1 A Well, I think it comes in in really two ways. First, the  
2 idea of royalty stacking flows from the fact there's lots of  
3 contributors. So obviously the total value of the product is  
4 not -- in that case has to be in some sense attributed to the  
5 wide range of people that contribute. So if there are a  
6 hundred contributors, on average at least, each guy is going  
7 to have a relatively small part of the overall value. This  
8 has to be by arithmetic. So that's part of it.

9       Secondly, it also says, in order to keep the overall  
10 royalty reasonable, that is, to have a reasonable royalty in  
11 the aggregate, each royalty is going to have to be relatively  
12 small, so when they add them all together they don't add up  
13 to too much to prevent that widespread adoption, right?  
14 That's our fear. Our fear is if we get too much royalties,  
15 we might not get widespread adoption. It's too expensive.  
16 If people fear they'll get held up, they won't adopt.

17 Q Do high-tech products like computers need to support more  
18 than one standard?

19 A Yes. I think we heard testimony to that effect. And my  
20 understanding is that computers, and like a Windows PC will  
21 support dozens -- hundreds of standards, even. So the  
22 problem with stacking kind of goes one layer further. Not  
23 only are there many patents within a standard, there's many  
24 standards within a product. So if each patent holder for  
25 each standard demanded a substantial royalty, think about how

1       that could add up, adding up over all the patent holders  
2       within the standard, and then add up all those across the  
3       standard. The royalties, in some sense, could potentially  
4       become very burdensome.

5       Q     Now, in your opinion, does the proper methodology for  
6       determining a RAND royalty have to take into account the risk  
7       of royalty stacking?

8       A     I think it does. You need to take account of the royalty  
9       stacking in thinking about what constitutes a reasonable  
10      royalty for any one contribution. Recognizing that that is  
11      only one of many contributions to the standard.

12      Q     How have standard-setting organizations like the IEEE and  
13      the ITU addressed the problem of hold-up?

14      A     They've addressed the hold-up problem through RAND  
15      commitments.

16      Q     And what is the purpose of the RAND commitment?

17      A     The purpose of the RAND commitment is to prevent hold-up.  
18      And by preventing hold-up you can promote widespread adoption  
19      of the standard. The basic issue of the RAND commitment is  
20      individual patent holders would have an ability to hold up  
21      the implementers if you didn't have some commitment. That  
22      is, wait for everybody to get their devices out in the  
23      market, and you say, oh, even though I'm a slice of the whole  
24      value, you need me in order to make it work. I'm going to  
25      charge you a very high royalty, reflecting the value of the

1 standard.

2 And the concept of the RAND commitment is to limit the  
3 individual patent holder to the value that he contributed.  
4 Now, he added some value, probably, to the standard. What he  
5 should get is his contribution, not the value created by the  
6 standard, not the value created by all that unpatented  
7 technology, not the value created by the other patented  
8 technology, not the value that came from agreeing on this  
9 common standard, which could have substantial value, and not  
10 the value created by widespread adoption.

11 Those other components, even though he can try to grab  
12 them by holding somebody up and saying, well, I won't let you  
13 have any of that value unless you get a deal with me; a RAND  
14 commitment says, no, you should be entitled to what you  
15 contributed, how much you added, how much better the standard  
16 was because you were in it rather than somebody else, and not  
17 be able to hold me up for the entire value created by the  
18 standard.

19 Q Now, does the RAND commitment also address the problem of  
20 royalty stacking?

21 A Yes, it does.

22 Q Can you explain that to the jury?

23 A Well, because in the process of saying what's reasonable,  
24 what's his contribution, you have to recognize that there are  
25 all those other contributors.

1       And in order to say what was any one of them worth and  
2 what's a reasonable royalty to be paying any one of them, you  
3 have to ask, well, is that consistent with the number of  
4 people that are there. So if you said, well, I'm going to  
5 give each guy one percent, well, that doesn't seem like much.  
6 But if there are 90 people, you can't give each of them one  
7 percent because you've chewed up almost the entire value,  
8 there's nothing left for all those other contributions to the  
9 value. If you had 150 people and gave them one percent,  
10 you'd be over one hundred percent.

11 Q   Is the purpose of the RAND commitment to address the  
12 problems of hold-up and royalty stacking?

13 A   Yes, that's what economics says. Economics tells us that  
14 you would have a RAND commitment precisely to address those  
15 issues.

16 Q   Now, let me turn back to the subject of royalty stacking  
17 again for just a moment. As an economist, how would you  
18 first assess whether a given royalty demand raises stacking  
19 concerns?

20 A   I think the simplest place to start is just by thinking  
21 about, again, take that royalty demand, think about how many  
22 potential people could ask for that. That is how many patent  
23 contributors there were. Multiply the demand by the number  
24 of contributors and say, you know, that's going to be the  
25 aggregate implied royalty, right? That's what the royalty

1 would be if everybody asked for that same amount. Now, there  
2 could be some differences across people, but it's a crude way  
3 to at least start thinking about the stacking issue.

4 Q Now, suppose you had ten patent holders and you wanted to  
5 understand whether the royalty demand of one of them  
6 implicated stacking concerns. And suppose that nine of the  
7 ten had not made similar royalty demands. Would stacking  
8 still be a concern that would bear on determining whether the  
9 demand is reasonable?

10 A Yes. Remember, the goal of the RAND commitment is to pay  
11 each patent holder the value of what he put in. The fact  
12 that the other nine people haven't collected their value  
13 doesn't mean you want to give that value to the one guy who's  
14 asking for the money, right? You don't want to say, well, he  
15 hasn't taken their value so I'll just give it to you. That  
16 doesn't make economic sense. That doesn't make common sense.  
17 You don't want to say, just because they're not collecting,  
18 I'm entitled to more.

19 Secondly, you have to remember, particularly when it comes  
20 to putting this together with hold-up, if you allow that one  
21 guy to collect that excessive royalty, even though all those  
22 other people aren't currently collecting, once you tell him,  
23 okay, it's okay to go out and ask and collect an excessive  
24 royalty, you can't believe that those other people are going  
25 to just sit by and not try to get theirs, too. And if they

1 do that, then a full-fledged stacking problem is going to  
2 emerge.

3 Q Suppose nine of them are abiding by their RAND  
4 commitments. From an economic perspective, does that allow  
5 the other patent holder to secure more?

6 A Should it? I think if you're asking does that change what  
7 he should get under RAND commitment? Absolutely not.  
8 Because under RAND commitment he's limited to the value of  
9 what he contributed. And that value is not lowered or not  
10 increased simply because the other people didn't collect  
11 theirs.

12 Q Now, I think you've told us that hold-up is where the  
13 patent holder uses the standards-essential patents to get --  
14 how would you put it -- excessive compensation? I don't want  
15 to put words in your mouth.

16 A I guess the way I think about it is, what is he trying to  
17 collect? Is he trying to collect the value he contributed to  
18 the standard? Or is he trying to collect the value that the  
19 users place on the standard as a whole. And the value of  
20 that standard as a whole reflects the contribution of all the  
21 other patent holders, the non-patent technologies, the value  
22 of agreeing on a standard, and the value of widespread  
23 implementation. The question is, is he trying to get just  
24 what he added, or is he trying to get leverage based on the  
25 total value of the standard? How hard would it be for the

1 end-user to do without compliance with the standard?

2 Q Now, from an economic perspective can a patent owner be  
3 engaged in hold-up where it is seeking something other than  
4 money?

5 A Yes. I mean, the question of hold-up is what leverage  
6 you're exerting to get consideration from the licensee. It's  
7 whether you're trying to exert leverage based on the value of  
8 your patents or you're exerting leverage based on the value  
9 they place on the standard.

10 And whether I'm using that leverage to get a cash payment,  
11 whether I'm using it to trade for a better deal on another  
12 patent license that I want from him, or to prevent him from  
13 charging me for another patent, doesn't really matter. The  
14 hold-up is coming because you're attempting to grab the value  
15 of the standard. Whether you collect that value in cash or  
16 collect that value in the form of a better deal on another  
17 patent, it's still hold-up.

18 Q Suppose the owner of a standards-essential patent used the  
19 leverage of the essential patents to try to get a more  
20 favorable deal on a grant-back of patents that are not  
21 essential to that standard. Could that be hold-up?

22 A Yeah, it could be hold-up and it would be hold-up if he's  
23 leveraging the value of the standard. The question of  
24 hold-up is what you're threatening that person with is not  
25 just losing the value of my patent, but losing the value of

1 the standard as a whole. If that's where it's coming from,  
2 that's the leverage you're using. It doesn't matter whether  
3 you're using that to get a check or using that leverage to  
4 get a better deal on other patents, you're engaged in hold-up  
5 because you're using leverage. Fundamentally that's not  
6 value you created but, rather, value that people created by  
7 using the standard.

8 Q Now, were you present when Mr. Dailey testified?

9 A Yes, I was.

10 Q Do you recall Mr. Dailey's testimony that what he was  
11 trying to bargain to was a zero-zero cross-license?

12 A Yes, I was.

13 Q How does that relate to your analysis of hold-up?

14 A Well, I think what it tells us is that just because you're  
15 trying to look for a zero-zero cross-license does not mean  
16 you're not engaged in hold-up. And, in fact, the value  
17 you're using to barter to get to zero-zero is, hey, if you  
18 don't get a deal with me, you're not going to be able to use  
19 the standard, then by definition you're engaged in hold-up.

20 That is, a RAND commitment is a commitment not to collect  
21 more than the value you contributed, to not appropriate the  
22 value of the standard. And if you're doing the latter, then  
23 that would be considered hold-up from an economic standpoint.  
24 I'm not a lawyer, so I can't give you a legal opinion. But  
25 from an economic point of view that's what it says.

1 Q And does the ITU permit owners of patents essential to the  
2 802.11 standard to condition their RAND commitments on  
3 reciprocity?

4 A I'm not a lawyer, again, so I can't give you a legal  
5 opinion. But my understanding is they allow you to say, "I  
6 will give you a license for my standards-essential patents,  
7 for this standard, on the condition that you give me a  
8 license for your patents on the same standard." So you can  
9 do that. You can say, look, I'll give you my 802.11 patents  
10 but you have to give me a license, too.

11 But my understanding is you can't demand that the other  
12 side give you some back-license on something else. If they  
13 want to give you that, that's fine, but you can't condition,  
14 in a sense of demanding that they do that. That's my  
15 understanding.

16 Q Does that make sense from an economic perspective?

17 A Absolutely.

18 Q Why is that?

19 A Well, the first one, you can see kind of expands the value  
20 of the standard because you're saying, look, I'm going to  
21 license you my standard-specific technologies, you're going  
22 to license me yours. I get more ability to use the standard,  
23 you get more ability to use the standard. From the point of  
24 the view of the standard-setting organization, sounds great.  
25 On the other hand, if you allow people to say, I'll only give

1 you access to my standards-essential patents if you give me  
2 some other valuable consideration that you have out there,  
3 like access to your non-standard-specific patents at great  
4 rates, that would allow them to engage in hold-up. People  
5 would say, I don't want to use the standard, because if I do,  
6 somebody is going to come demand great rates on my  
7 intellectual property.

8 Q Now let's turn more specifically to some of the facts that  
9 are involved here. In reaching your conclusions in this  
10 case, what was the first thing that you looked at, Professor  
11 Murphy?

12 A The first thing I looked at were the offer letters.

13 Q Let's start with the October 29th letter relating to the  
14 H.264 standard. And we've looked at some exhibits before.  
15 We can go through this quickly. I don't want to belabor  
16 something that we've already presented.

17 MR. PRITIKIN: Let's put up PDX 27. This is a  
18 demonstrative, Your Honor. We've seen this before, I  
19 believe.

20 Can you explain what is shown here in relation to the  
21 demand in the October 29th letter?

22 A Yes. The roughly half a penny on the left represents what  
23 was determined to be the RAND royalty for Motorola's H.264  
24 patent portfolio. So that's a little over half a cent. If  
25 you take the 2.25 percent that Motorola asked for in their

1 opening letter on October 29, 2010, apply that to a \$500  
2 laptop, that comes out to a demand of \$11.25, which is  
3 roughly 2,000 times the RAND rate.

4 Q Why did you pick a \$500 laptop as the example?

5 A It's pretty close to a typical laptop that exists out  
6 there in the marketplace. I think the actual average laptop  
7 is a little more like \$528, something like that.

8 Q You're aware that the court determined a RAND rate for the  
9 Motorola patents and the Microsoft products. Did the court  
10 also determine a RAND range?

11 A Yes, they did.

12 Q And how does the Motorola demand, in this example \$11.25,  
13 compare to a RAND royalty at the very, very top end of the  
14 RAND range set by the court?

15 A It's still many, many times above -- 70 times or  
16 something -- the upper end of the RAND range. So the basic  
17 economics I took away from this is that this was nowhere  
18 close to a RAND rate.

19 Q You understand the top end of the RAND rate found by the  
20 court was 16.4 cents?

21 A Yes. It's about 16.4 cents. So if you think about a  
22 hundredth of this \$11.25 would be about \$0.11, so it's a  
23 little higher than that, but not much. So really telling you  
24 that this is way out of bounds, not just with respect to the  
25 RAND rate, but the RAND range, which covered what potentially

1 could be a reasonable royalty. So it just says, this isn't  
2 close to a reasonable royalty.

3 Q Let's turn to PDX 28. And, again, this is a slide I think  
4 we've seen before. Again, how did you go about figuring out  
5 the magnitude of Motorola's demand?

6 A Well, it was a really pretty straightforward calculation.  
7 It's like -- you know the 2.25 percent. You know how many  
8 computers are sold, Windows PCs roughly are sold worldwide,  
9 you just go to the internet and get that. You know roughly  
10 the average price of a PC. So you multiply the number of  
11 PCs, price per PC, gives you total dollars. Multiply that by  
12 2.25 percent and you get a number very close to \$4 billion.

13 Q Using the same estimate, what would the annual royalty be  
14 with what the court determined to be RAND?

15 A Using that .55 cents multiplied by the exact same numbers,  
16 you come up with a little less than \$2 million. Again,  
17 there's that 2,000-to-1 ratio. The RAND royalty would amount  
18 to about \$2 million a year. The royalty demand in the letter  
19 would amount to about \$4 billion a year. So pretty far out  
20 of whack.

21 Q As we progress through the sequence here I'm going to ask  
22 you about what conclusions you reached, Professor Murphy.  
23 Did you reach any conclusions from the magnitude of  
24 Motorola's H.264 demand?

25 A Yeah. I concluded that they were consistent with Motorola

1 desiring to hold Microsoft up. That is, you know, such a  
2 large demand could only be explained by somebody trying to  
3 extract the value of the standard. That is, the value of the  
4 individual patents would be a far smaller number than that.  
5 And, therefore, such a big demand would have to be reflective  
6 of hold-up.

7 Q Let's turn now to the October 21st letter relating to the  
8 802.11 standard. And let's put up PDX29. Can you explain  
9 what's shown here?

10 A This is really the same comparison done for a \$199 Xbox.  
11 So I'll go quickly. The RAND royalty determined was -- let's  
12 call it three-and-a-half cents. \$199 Xbox at 2.25 percent,  
13 comes out to \$4.48. So comparing \$4.48 to three-and-a-half  
14 cents, that's, again, more than one-hundred-to-one in terms  
15 of the royalty ratio.

16 Q Let's take a quick look at PDX30.

17 A This goes to a more expensive Xbox version. This one  
18 sells for roughly \$400. The RAND royalty is the same,  
19 three-and-a-half cents. In this case they're asking for  
20 almost \$9. Again, that's over 200-to-1.

21 Q Is there any difference in the WiFi functionality between  
22 the two?

23 A No. The WiFi functionality would be the same.

24 Q What conclusions do you draw from the fact that the  
25 royalty is higher on the \$399 model?

1 A I think it's very consistent with them attempting to hold  
2 Microsoft up for the value of the technology.

3 Q Why is that, sir?

4 A Again, because there's such a vast difference, even bigger  
5 difference for this model than the other.

6 Q Now, again, have you considered the high end of the RAND  
7 royalty range set by the court in connection with 802.11?

8 A Yes. I believe that's something on the order of \$0.19.

9 Q Nineteen-and-a-half cents?

10 A Yeah, on the order of \$0.19. So, 19.5 more, exactly. You  
11 know, 19.5 cents compared to a \$9 demand. So even if you go  
12 to the upper end of the range determined by the court,  
13 Motorola's demand is nowhere close to that. Again, you say,  
14 well, what does that look like? Well, such a large demand is  
15 certainly very consistent with an effort to hold somebody up,  
16 because we know the value of the standard could be quite high  
17 even if the value of the individual patent is, as determined  
18 by the court, you know, something like three-and-a-half  
19 cents.

20 Q Do you think that these disparities are consistent with a  
21 strategy of entering into a RAND license?

22 A From an economic standpoint I think it doesn't fit well.  
23 Because if I'm trying to negotiate a RAND license, I have an  
24 incentive to show people I want RAND terms, not that I want  
25 to hold them up. Because, remember, everybody knows there's

1       this hold-up potential out there, that people can demand  
2       excessive royalties. This patent hold-up problem is widely  
3       recognized. So if somebody comes to you with such a high  
4       demand, the logical conclusion you're going to reach is, hey,  
5       he's holding me up. And so you would expect somebody who  
6       wanted to negotiate on RAND terms would have an incentive to,  
7       in fact, communicate that by coming in with a reasonable  
8       offer.

9       Q     Let's take a look at PDX31. And, again, the jury has seen  
10      a lot of these. Briefly can you explain what's shown here,  
11      Professor Murphy?

12      A     This is the same exercise. In this case we use the number  
13      of Xbox consoles sold, compare the RAND royalty on the left,  
14      which is less than \$500,000 a year, to the Motorola demand  
15      contained in the October 21st letter, which comes out to more  
16      than \$75 million a year. So, half a million versus more than  
17      \$75 million. 150-to-1, roughly.

18      Q     Now, Professor Murphy, you were aware that Microsoft had  
19      sued Motorola on October 1st of 2010, correct?

20      A     Yes.

21      Q     How does that affect your analysis?

22      A     I don't -- it doesn't directly affect the calculations  
23      that I've shown you so far.

24                    MR. PRICE: Your Honor, I'm going to object. I think  
25      it's beyond the scope of the report.

1                   THE COURT: Does somebody want to provide me with a  
2 copy of the report?

3                   MR. PRITIKIN: We will, Your Honor.

4                   May I approach Your Honor?

5                   THE COURT: Yes.

6                   MR. PRITIKIN: I'm going to hand you the rebuttal  
7 report as well, so we have it in case we need it. And I  
8 would direct the court's attention to paragraph 79.

9                   THE COURT: The July 24th report goes to paragraph  
10 61.

11                  MR. PRITIKIN: I didn't hear, I'm sorry.

12                  THE COURT: The July 24th report goes to paragraph  
13 61. Did you mean to say 79?

14                  MR. PRITIKIN: 79, yes, sir. I'm referring to  
15 paragraph, Your Honor, not the page. I'm sorry. It's on  
16 page 30.

17                  THE COURT: Well, mine goes to page 23 and signed by  
18 Dr. Murphy on July 24, 2012.

19                  MR. PRICE: I think he's referring to June 13th.

20                  MR. PRITIKIN: I'm sorry, Your Honor, I handed you  
21 the wrong one. Let me give you my copy. I'm sorry.

22                  MR. PRICE: Your Honor, if the purpose of the  
23 question is to elicit this, I have no objection. I thought  
24 it was broader than that.

25                  THE COURT: I'll overrule the objection.

1 Q Do you remember the question, Professor Murphy?

2 A Unfortunately not, sorry.

3 Q All right. The question I asked was how did the fact that  
4 Microsoft sued Motorola in early October of 2010 affect your  
5 analysis?

6 A I think it doesn't change my analysis of whether hold-up  
7 was going on or not. It actually fits into the analysis  
8 because it helps explain what Motorola was attempting to  
9 obtain by holding Microsoft up on its standards-essential  
10 patents. In fact, what they were hoping to obtain were  
11 better terms of the licenses on those other patents. So it  
12 explains what they were trying to get from the hold-up more  
13 than it does change my analysis. And it really doesn't  
14 change the notion that they were using the value of the  
15 standard to try to extract more favorable terms from  
16 Microsoft at all.

17 Q Now, after you had looked at Motorola's letters, what did  
18 you look at next?

19 A I looked at their other conduct, in particular their  
20 conduct regarding seeking injunctions to, again, back up that  
21 hold-up threat.

22 Q Which injunctions are you referring to?

23 A The injunctions that have been talked about over the last  
24 several days. The injunctions that flowed in late 2010.  
25 Looking for injunctions in both the U.S. courts, as well as

1 International Trade Commission, and injunctions in Germany  
2 are the ones that come to my mind.

3 Q Now, from an economic perspective, how do the October  
4 letters relate to the request for injunctions?

5 A I think the injunctions really are giving you that hold-up  
6 threat. That is, if you don't reach license terms with us,  
7 you're going to lose the value of the standards. You're not  
8 going to be able to sell your products that are compatible  
9 with those standards. So you either leave the standards in  
10 and you can't sell them, or take the standards out. And as  
11 we heard from Mr. Gutierrez, to try to sell products that are  
12 really crippled from an economic standpoint.

13 Q And as an economist, what conclusion do you draw from  
14 Motorola's efforts to obtain injunctions on the 802.11 and  
15 H.264 standards-essential patents?

16 A Again, I think that their efforts to obtain those  
17 injunctions are really part of the effort to hold Microsoft  
18 up, to deny them access to the value of the standards.  
19 Because that injunction, by its very nature, doesn't just say  
20 effectively you can't use their product -- use their patents,  
21 you lose the value of the standard as a whole. And that's  
22 really the whole source of the patent hold-up problem.

23 Q Did the timing of Motorola's injunction actions relative  
24 to the filing of this lawsuit play any role in your analysis?

25 A I think it does. And, in fact, it's not just the filing,

1       but the continued efforts to go after injunctions, after  
2 Microsoft had said it was seeking a RAND royalty. And even  
3 after they said explicitly that they wanted -- they were  
4 willing to take a RAND royalty, my understanding is that  
5 Motorola continued to pursue its injunction, for example, in  
6 Germany and in the International Trade Commission.

7           And given that they had already been told they were going  
8 to get a RAND rate, the reason to pursue an injunction would  
9 logically be, then, from an economic standpoint, to continue  
10 to exert that hold-up pressure.

11 Q   Is there any plausible explanation for that beyond  
12 hold-up, in your opinion?

13           MR. PRICE: Objection. That's beyond the scope of  
14 his expertise.

15           MR. PRITIKIN: I'll withdraw the question, Your  
16 Honor.

17 Q   From an economic perspective, and that's what I'm asking  
18 Professor Murphy, is there a plausible explanation for  
19 Motorola's conduct?

20 A   I don't want to say that one couldn't dream up something.  
21 But I don't think there's any logical that comes to my mind.  
22 It seems to fit very well with the plan of trying to use the  
23 leverage afforded by the standard to get better terms in  
24 their licensing endeavors with Microsoft.

25 Q   Are you saying that the holders of standards-essential

1       patents should never be permitted to get injunctions?

2       A    No, I'm not saying that.

3                    MR. PRICE: Objection. That calls for a legal  
4                   opinion, I believe.

5                   THE COURT: I'll allow it from the point of view of  
6                   an economist, not a lawyer.

7       A    That was going to be my first line, actually. I can't  
8           give you a legal opinion on that. And I was asked this  
9           question in my deposition, and I think I led with that same  
10          comment. "I can't give you a legal opinion." From an  
11          economic standpoint, I think you have to recognize that an  
12          injunction, by its very nature, is going to impose leverage  
13          commensurate with the hold-up value. It doesn't mean you  
14          should never allow an injunction, you just have to be very  
15          careful because you have to know that once they give you that  
16          injunction it's not just losing the value of the patent, it's  
17          losing the value of the standard. So injunctions on  
18          standards-essential patents are going to impose that hold-up  
19          leverage, whether you want to or not. And that's the  
20          problem.

21      Q    Now, let's turn to a different topic, Professor Murphy.  
22      Are you aware of the argument that has been advanced by  
23      Motorola that it didn't have enough time or information to  
24      make more refined demands back in October of 2010?

25      A    Yes, I am.

1 Q All right. And what is your reaction to that suggestion?

2 A I don't think that withstands scrutiny.

3 Q Why is that?

4 A I think there are a number of things you can look at that  
5 would tell you right up front that that demand was  
6 unreasonable. You don't have to do in-depth research to  
7 realize that.

8 Q Are you suggesting they should have known the exact RAND  
9 rate then?

10 A No, I'm not saying that at all. Remember, for H.264 they  
11 were off by a factor of 2,000. So I'm not saying you have to  
12 be real precise. I'm just saying you have to get some --  
13 it's pretty easy to get reasonably close, or at least a lot  
14 closer than they got.

15 Q Have you prepared a chart that summarizes the kinds of  
16 information that was readily available to Motorola at the  
17 time it sent the letters to Microsoft in 2010?

18 A Yes.

19 Q And let's look at PDX33. Is this the exhibit you  
20 prepared?

21 A Yes, it is.

22 Q Let's start with the first item. "The nature of its  
23 contributions to the standards and the number of other  
24 essential patent owners." What is your understanding as to  
25 that, sir?

1 A Well, my understanding is that Motorola participated in  
2 the formation of these standards. So they were aware of the  
3 number of other contributors. They are aware of the  
4 standards-setting process and the value of all the other  
5 things that go into making it a successful standard. As  
6 such, they would have known that their contribution was,  
7 while maybe somewhat important, was still a small part of the  
8 overall total.

9 Q To what extent did you take into account the testimony  
10 that Motorola's witnesses were unable to say whether their  
11 802.11 or H.264 patents are in the top half or bottom half in  
12 terms of value?

13 A Yes --

14 MR. PRICE: I'm going to object. That's leading and  
15 also goes beyond the scope of his report.

16 THE COURT: I'm going to sustain on the leading, so  
17 let's rephrase it. In terms of beyond the scope of the  
18 report, I need to hear the next question.

19 Q Do you have any understanding as to what Motorola  
20 witnesses have said as to whether their patents ranked in the  
21 top half or bottom half in terms of value?

22 A My understanding from the first trial was that Motorola's  
23 witnesses couldn't say whether their patents ranked in the  
24 top half or the bottom half. So if you think about a  
25 standard that had many, many contributors, you can think they

1 didn't know whether they were in the better half or worse  
2 half of those contributors. So they were kind of one of many  
3 contributors from that point of view.

4 MR. PRICE: Your Honor, could I just make a standing  
5 objection just to preserve on the -- I think I'm required  
6 to -- under the previous motion on litigation during the  
7 trial, conduct?

8 THE COURT: I'll see counsel at side bar.

9 (Court and counsel met at side bar as follows.)

10 THE COURT: Litigation during the trial, conduct? I  
11 didn't understand.

12 MR. PRICE: I was trying not to be that clear,  
13 actually. I think we filed a motion in limine, Your Honor,  
14 on litigation conduct and the position the parties took  
15 during the trial as being relevant.

16 THE COURT: I understand. Yes, you may have a  
17 standing objection to that in regards to that question. I'm  
18 going to overrule it.

19 MR. PRITIKIN: I have a number of the findings that  
20 I'm going to be using with Professor Murphy. They're  
21 undisputed facts, and I'd like to do it as efficiently and  
22 economically as I can. There are a couple of ways I could do  
23 it. We're going to be getting into these in just a few  
24 minutes. I could show him the finding, ask him a question --  
25 really the purpose is simply to get the fact out there that

1 it's an undisputed fact. The court said he can use the  
2 findings as a foundation for it. And it would be helpful,  
3 perhaps, to get some guidance on how the court would like us  
4 to do that. I don't want to waste a lot of time with it, but  
5 it's important to get into the record.

6 THE COURT: I think I would continue my practice of  
7 asking you to ask the witness: Do you understand it's an  
8 undisputed fact, such and such. And I would appreciate it if  
9 you wouldn't read it so it looks like it's coming out of some  
10 prior record.

11 MR. PRITIKIN: It would be a leading question, by  
12 definition.

13 THE COURT: He can answer yes or no.

14 MR. PRITIKIN: I'll do it that way.

15 MR. PRICE: Again, I'm fighting an uphill battle here  
16 but have to make a record. I thought that the court's ruling  
17 intent was to have a witness with competence actually testify  
18 to the facts. And obviously this witness isn't competent to  
19 testify to these facts. What's happening here is it's just  
20 being read in as an undisputed fact through the question, not  
21 throughout a witness's answer.

22 THE COURT: I assume he's going to then use as a fact  
23 in an area that he is competent to testify in.

24 MR. PRITIKIN: It's the background for his analysis.

25 MR. PRICE: The distinction I was making is, I

1 thought it was a witness that would say that they knew that  
2 was a fact, and we could cross examine them on it. And this  
3 is using it as an undisputed fact and asking him to make a  
4 conclusion based on that, which is a very efficient --

5 THE COURT: Just so we're clear, I believe that the  
6 witness is entitled to take findings from the first trial,  
7 use them as a basis for an opinion. And that's what I'm  
8 attempting to create, that record. If he reads a finding in  
9 and then doesn't use it, I'm going to go back and strike it  
10 out of the record. Because he doesn't just get to read this  
11 stuff in; it has to be something that he's used for his  
12 analysis.

13 MR. PRITIKIN: That's exactly what I intend to do.

14 MR. PRICE: I understand your ruling.

15 (The side bar concluded.)

16 Q Let's talk a little about the nature of the contributions  
17 and what it is that was known to Motorola at the time. Have  
18 you prepared an exhibit that summarizes some of the  
19 undisputed facts about the H.264 standard that you took into  
20 your account in your economic analysis?

21 A Yes, I did.

22 Q Let's put up PDX34. Are these -- is it your  
23 understanding, sir, that these are undisputed facts in this  
24 proceeding?

25 A Yes. My understanding is that these are facts that are

1 undisputed between the parties.

2 Q Let's start with your explaining to the jury what these  
3 are, and then we'll go to how they were used in your  
4 analysis.

5 A So I'll go through them one at a time.

6 Q All right.

7 A The first one is, "The H.264 standard is a large and  
8 technically-complex standard that resulted from the  
9 contributions of roughly 170 entities and that submitted over  
10 2,300 documents."

11 THE COURT: I think the jury can probably read this,  
12 counsel. Why don't we get to the part of his analysis.

13 MR. PRITIKIN: I don't want to waste time with this,  
14 Your Honor, but I do want to make sure that it's in the  
15 record. And so I'd be happy to mark this as an exhibit and  
16 we could put it in the record and we could save probably a  
17 lot of time that way.

18 THE COURT: Mr. Price.

19 MR. PRICE: We object to that, it's undisputed facts.  
20 I think it probably shouldn't be read.

21 THE COURT: All right. Continue on, sir.

22 A The second is, "There are at least 52 entities that own  
23 H.264 standards-essential patents." And, number three,  
24 "There are at least 2,500 patents throughout the world that  
25 are essential to the H.264 standard."

1 Q Now, how did these undisputed facts bear on your analysis,  
2 sir?

3 A I think they were some of the facts that really went into  
4 saying that, again, Motorola's contribution was a relatively  
5 small part of the overall H.264 standard.

6 Q And how does that bear on the question of whether their  
7 conduct is more consistent with hold-up or with trying to  
8 enter into a RAND license?

9 A Again, so if we thought about something like Windows, we  
10 know that H.264 is only one of many video standards. Video  
11 is only one of the things that a PC does. Software is only  
12 part of what a personal computer, like a laptop, would do.  
13 So if Motorola's technology is a small part of that one video  
14 standard, which is only a part of what the laptop does,  
15 something like a 2.25 percent royalty on the laptop value is  
16 just way out of line of what that potentially could be, given  
17 that there are so many other people just within that H.264  
18 standard.

19 Q Let's go on to PDX35.

20 THE COURT: After our break.

21 Ladies and gentlemen, remember that we're going to break  
22 at 4 o'clock today. So we'll have you back out here a little  
23 bit after ten after three, and we'll run until about  
24 five minutes to four. Then I'll stop and read you all those  
25 wonderful things you love to hear and also chat a little

1 about the schedule for Friday, Monday and Tuesday.

2 (The following occurred outside the presence of the jury.)

3 THE COURT: We'll be in recess until a little bit  
4 after ten after three.

5 (The proceedings recessed.)

6 (At this time the jury entered the courtroom.)

7 By Mr. Pritikin:

8 Q Professor Murphy, I want to move on to two more of these  
9 that have some background undisputed facts. We will cover  
10 those and then come back to some questions about them.

11 Let's go to PDX 35. Do you understand these are both  
12 undisputed facts?

13 A Yes.

14 Q And would you put these into the record, please?

15 A "Motorola did not provide the invented technology in the  
16 H.264 standard, but instead built upon already existing  
17 technology." Second: "Motorola's H.264 standards-essential  
18 patent portfolio only constitutes a sliver of the overall  
19 technology incorporated in the H.264 standard."

20 Q Let's move to PDX 36. And do you understand these also  
21 are undisputed facts?

22 A Yes.

23 Q And could you put these into the record, please?

24 A Yes. "In reference to Windows video, encoding/decoding is  
25 only a tiny part of what Windows software does, and Windows

1       supports other video compression standards in addition to  
2       H.264." Second: "Motorola's H.264 standards-essential  
3       patents are only of minor importance to the overall  
4       functionality of Microsoft's Windows product."

5       Q     And the last one relates to Xbox. What is that undisputed  
6       fact?

7       A     "Motorola's H.264 standards-essential patents are of only  
8       minor importance to the overall functionality of Microsoft's  
9       Xbox product."

10      Q     Now, how do the undisputed facts that we have just  
11       covered, how do those bear on your analysis of whether the  
12       conduct here is more consistent with hold-up or with entering  
13       into a RAND license?

14      A     Again, it tells us that there is going to be a large gap  
15       between the hold-up value, which would be the value of the  
16       standard, and the value of Motorola's contribution, because  
17       all of these facts are telling us they are just a small part,  
18       of minor importance, a sliver of the value. And that makes  
19       it relatively easier to say, when you are looking at the  
20       data, is that offer more consistent with the hold-up value  
21       being a much larger number than the value of the patents,  
22       which of course is borne out when we actually look at the  
23       comparison to what was determined to be the RAND rate. That  
24       analysis is confirmed by the finding of what the RAND rate  
25       actually was relative to Motorola's demands.

1 Q Now, let's switch gears and talk about some of the  
2 background undisputed facts that you considered in your  
3 analysis with respect to 802.11. And let's move to PDX 37.

4 A Again, my understanding is these are undisputed facts.  
5 Number one: "The 802.11 standard is immense and complex.  
6 The current version is 2,793 pages long." Second: "There  
7 are at least 92 entities that own 802.11 standards-essential  
8 patents." And, three: "There are possibly thousands of  
9 patents essential to the 802.11 standard."

10 Q We will pick these up all at once. Let's go on to PDX 38.  
11 What are these undisputed facts?

12 A Again, number one: "Motorola's 802.11 standards-essential  
13 patent portfolio provides only minimal contribution to the  
14 802.11 standard." Number two: "Motorola's 11 relevant  
15 802.11 standards-essential patents constitute only a sliver  
16 of the overall technology incorporated in the 802.11  
17 standard."

18 Q And, again, I am going to ask you the question, Professor  
19 Murphy, how did these undisputed facts bear on your analysis  
20 of whether the conduct was more consistent with hold-up or  
21 with trying to enter into a RAND license?

22 A Again, what it tells us is -- given that Motorola's  
23 contribution is only a small part of the overall patented  
24 technology in the standard, it tells us that their  
25 contribution is going to be even a smaller part of the

1 overall value of the standard, of course, which includes all  
2 of those other components. And, therefore, there is a big  
3 gap between the potential hold-up value on the one hand,  
4 which is the value of the standard, and the RAND value, which  
5 is their contribution, which makes it relatively  
6 straightforward. And then you look at what the offers were  
7 and say, are they in line with RAND? And the answer is, no,  
8 they are very far away from what the RAND rates are and very  
9 close -- or much higher, which would be much more consistent  
10 with the hold-up scenario.

11 Q As an economist, would you have any expectation as to  
12 whether information concerning the significance of Motorola's  
13 contributions to the standards would have been available to  
14 Motorola?

15 A It would have been for a couple of reasons. One, they  
16 participated in the standard setting. In the case of H.264,  
17 they also participated in discussions at the patent pool.  
18 They didn't ultimately join the pool, but they were there as  
19 well. They had an idea of what their contributions were as a  
20 part of the overall standard as part of their ordinary course  
21 of business.

22 Q Let's turn now to the subject of the number of other  
23 holders of patents essential to the standards. As an  
24 economist, would you expect that to have raised any concerns  
25 in October of 2010 with regard to the royalty rates requested

1 by Motorola?

2 A Yes. In fact, just thinking about the number of other  
3 contributors gives you a really quick check on whether what  
4 you are asking for is commensurate with your contribution.  
5 Remember, for example, Motorola said they didn't know whether  
6 they were in the top half or the bottom half. Just asking  
7 the number of contributors can give you a rough idea of  
8 whether what you are asking for is reasonable.

9 Q Let's turn to PDX 39. Can you explain to the jury what is  
10 illustrated on this demonstrative? Does this relate to  
11 royalty stacking?

12 A Yes, it does. It is a real simple stacking calculation.  
13 We know there were 52 entities that claimed to have  
14 standards-essential patents. Multiply 52 by the 2.25 asked,  
15 and that comes out to 117 percent of the price of a laptop.  
16 So if all 52 asked for 2.25, they would be asking for  
17 117 percent of the price of the laptop. And think about it.  
18 Totally, they really shouldn't get more than the value of  
19 H.264, which is a small part of the laptop. So 117 percent  
20 of the laptop, obviously, is way out of bounds.

21 Q As an economist, would you have expected that information  
22 of this sort would have been available to Motorola in October  
23 of 2010?

24 A Yes. You can get that information from the  
25 standard-setting organization, for example. And they

1 participated in it, so they would have even more fine-grained  
2 information, one would presume.

3 Q Let's turn to PDX 40. Can you explain what is shown here  
4 with respect to 802.11 and royalty stacking?

5 A Corresponding calculation. Not to bore with you the  
6 details. Again, here, there are 92 people, patentholders.  
7 We multiply that by 2.25, you get 207 percent. Obviously you  
8 can't have 92 people ask for 2.25. That would be more than  
9 the value of the Xbox, just for 802.11, forgetting about all  
10 of the other things that go into making an Xbox. Obviously,  
11 just looking at that would tell you that is out of line.

12 Q Let's go back to PDX 33 for a moment. This was the chart  
13 we talked about earlier where you summarized the information  
14 that was readily available to Motorola in October of 2010. I  
15 think we have covered topic one, but I would ask you briefly  
16 to summarize what your conclusions were with respect to one?

17 A I think on number one, really realizing two things,  
18 Motorola's technology was a small part of the overall  
19 technology contributed to the standards. That, together with  
20 just the number of other contributors and the percentages  
21 Motorola was asking for, says those royalties could not  
22 reflect the value of each individual's contributions because  
23 they would add up to more than the value of the product, let  
24 alone the value of the standard.

25 Q Let's move on to number two on the list, the royalties

1 charged by the MPEG LA pool. Have you prepared an exhibit  
2 that compares the maximum annual royalty charge by the  
3 MPEG LA pool to Microsoft with the royalties that Motorola  
4 demanded for its H.264 patents?

5 A Yes, I have.

6 Q Let's take a look at PDX 41. What is shown here,  
7 Professor Murphy?

8 A Here is the MPEG LA pool for which the amount that would  
9 be paid by Microsoft would be \$13 million per year. That's  
10 for 2,400-plus patents contributed by 26 licensors. So 26  
11 companies' patents totaled from over 2,400 patents, the  
12 market price, whatever people were paying for that from that  
13 from the pool, was \$13 million per year. That's what  
14 Microsoft was paying. On the other hand, Motorola was asking  
15 for \$4 billion for just their contributions. Remember, this  
16 H.264 pool is the pool that they participated in. So this  
17 kind of information would have been available to them.

18 Q Now, are you suggesting as an economic matter that a RAND  
19 royalty cannot exceed pool rates?

20 A No, I am not saying that at all. I am saying it gives you  
21 a ballpark that one should be in. When 26 companies are  
22 charging \$13 million for one company whose patents they say  
23 -- you can't say are better or worse than others, that  
24 \$4 billion is just way out of line if they have only  
25 contributed a sliver of the technology or a small part of

1       that technology. To ask for \$4 billion is really way out of  
2       line.

3       Q     Let's turn back to PDX 33, and move on to Item 3, the  
4       price of the WiFi chips that provide 802.11 functionality.  
5       How did this figure into your analysis of information that  
6       was readily available to Motorola in October 2010?

7       A     Again, it is another check that we can do to say what  
8       seems reasonable. The entire chip that provides the WiFi  
9       functionality that Microsoft was purchasing to put into its  
10      Xbox costs between \$3 and \$4. That's for the entire WiFi  
11      functionality embedded in that chip. Again, Motorola, if we  
12      go back to the Xbox, was asking somewhere between \$4 and \$9,  
13      roughly, for just their contribution to WiFi. Again, not an  
14      exact calculation, just gives you an idea of the  
15      disproportionality.

16      Q     Let's move on to the fourth item you posted here on  
17      information readily available to Motorola. The royalty rates  
18      recommended by its hired consultant, InteCap. What is  
19      InteCap and what's the analysis you are referring to here?

20      A     InteCap is a consulting firm that works largely in the  
21      patent area. They consulted for Motorola, evaluating what  
22      the value was of their 802.11 patent portfolio. I believe it  
23      was in 2003.

24      Q     Now, are there, again, some undisputed facts relating to  
25      InteCap that you took into account in your analysis?

1 A Yes, there are.

2 Q Would you turn to PDX 42? Can you tell the jury what the  
3 undisputed facts are that form the background for your  
4 analysis of the InteCap study in connection with your  
5 conclusions?

6 A Yes. Number one, "InteCap recommended an effective  
7 royalty of 0.1 percent of the price of 802.11-enabled  
8 products by PCs, laptops and game consoles. InteCap  
9 recommended a royalty of 0.5 percent of the price of WiFi  
10 chips, like those sold by Marvell. InteCap significantly  
11 overestimated Motorola's contribution to the 802.11 standard;  
12 it's rates are 25 times too high."

13 Q Was the InteCap study performed for Motorola?

14 A Yes, it was.

15 Q And how did the royalties that InteCap had recommended  
16 that Motorola charge for its 802.11 patents for a product  
17 like Xbox compare to what it demanded for Microsoft?

18 A They were much, much less. Because, remember, they are  
19 asking for 2.25 percent. Based on the first one, it would be  
20 0.1 percent. Their rates would be roughly 22 and a half  
21 times the InteCap rates. If you go to the chip -- Remember,  
22 we said the chips sell between 3 and 4. Let's use \$4. One  
23 percent of \$4 is 4¢. So half a percent is two cents. So the  
24 InteCap rate would give you a number like 2¢ for the chip.  
25 Again, they were asking for 4.50 or more. Again, way out of

1 bounds.

2 Q So the .5 percent would apply if the royalty is paid on a  
3 chip?

4 A That's correct.

5 Q And the .1 percent would apply under the InteCap study if  
6 it is paid on, for example, the Xbox?

7 A That's correct.

8 Q In either case, are the numbers much lower than what  
9 Motorola was asking for?

10 A Far lower. Many multiples lower.

11 Q Now, you were present when Mr. Dailey testified that he  
12 had not considered the InteCap study before formulating the  
13 demands he made on Microsoft?

14 A Yes, I was.

15 Q And how does that bear on your analysis?

16 MR. PRICE: Object, your Honor. That's beyond the  
17 scope of his expertise, evaluating the credibility of a  
18 witness.

19 THE COURT: I will sustain the objection.

20 MR. PRITIKIN: It was not an artfully framed  
21 question, your Honor. Let me try again.

22 By Mr. Pritikin:

23 Q Was it your understanding that the information in the  
24 InteCap study was available to Motorola?

25 A It would have been available. It is my understanding that

1 people who had -- were aware of the InteCap study would still  
2 have been at Motorola and would have been available to talk  
3 to.

4 Q From an economic perspective, when a company is entering  
5 into license negotiations does it have any incentive to rely  
6 on studies of this kind that have been performed for it?

7 A I think it does, in the sense from an economic point of  
8 view, again, you want to show the other side that you are  
9 offering a reasonable royalty. Particularly when you are  
10 under a RAND commitment, you would like to communicate that  
11 you are offering a RAND rate, or you are interested in  
12 getting to a RAND rate, rather than making an offer that is  
13 much more like hold-up.

14 Q We can take that down. Let me shift gears to another  
15 topic, Professor Murphy. Now, based on what you have learned  
16 and the analysis you have done in this case, as of October of  
17 2010 had Motorola ever licensed its 802.11 or H.264 patents  
18 on a stand-alone basis?

19 A My understanding is that they had not.

20 Q And you were present when Mr. Dailey suggested that  
21 Motorola had used the 2.25 royalty here because they had  
22 previously been used in cellular communications licensing or  
23 package licensing involving a number of standards?

24 A Yes, I was.

25 Q And as an economist, what is your reaction to that?

1 A Well, the fact that they were able to license their  
2 cellular portfolio for 2.25, or a package of different  
3 standards for 2.25, would not be a good economic  
4 justification for saying these individual standards not  
5 related to cellular would be -- you know, 2.25 would be a  
6 good rate for that.

7 Q Are Motorola's patents essential to the various cellular  
8 standards for a cell phone?

9 A My understanding is that Motorola has standards-essential  
10 patents for several of the cellular standards, yes.

11 Q And are there any important differences between the  
12 cellular standards-essential patents and 802.11 and H.264 of  
13 Motorola?

14 A I think there are a couple. One is, in contrast to 802.11  
15 and H.264, where Motorola was not thought of having a  
16 particularly strong portfolio, I think it is generally  
17 understood Motorola has a very strong cellular portfolio.  
18 Secondly, and probably most importantly, if you think about  
19 how important a cellular standard is to a cell phone, which  
20 is part of what goes into what you are willing to pay or what  
21 is the appropriate rate for a component, that's not going to  
22 be the same as what H.264 is to a laptop. That is, cellular  
23 functionality is core to the operation and use of the cell  
24 phone. H.264 is one of many things you do with a laptop. I  
25 don't think there is any economic comparison or reason to

1 believe that 2.25 being a reasonable rate for cell phones, if  
2 it were, would translate over to these standards for these  
3 products.

4 Q We heard testimony from Mr. Dailey that Motorola wants a  
5 royalty of 2.25 for a license to all of its portfolios of  
6 standards-essential patents, or for a license to just one of  
7 those portfolios. From an economic standpoint, does that  
8 mean that each portfolio is worth 2.25?

9 MR. PRICE: I will object. This is beyond the scope  
10 of his report.

11 MR. PRITIKIN: Your Honor, I would direct your  
12 attention to Paragraph 74 on Page 27.

13 THE COURT: Of which one?

14 MR. PRITIKIN: This is the first report, the opening  
15 report.

16 THE COURT: The July 24th, 2012?

17 MR. PRITIKIN: June 13th, 2013. Sorry.

18 THE COURT: I will sustain the objection to the  
19 question as currently constituted.

20 MR. PRITIKIN: Let me see if I can rephrase the  
21 question, your Honor.

22 By Mr. Pritikin:

23 Q Let me ask you, Professor Murphy, if 2.25 is charged for  
24 cellular and other portfolios, how do you unpack that?

25 A You really can't. The fact that somebody is willing to

1 pay 2.25 for a collection of standards doesn't tell you what  
2 they would be willing to pay for one of those standards. In  
3 particular, if you are taking something sold to a cell phone  
4 manufacturer, you would have to start with the belief that  
5 the cell phone patents and the cell phone standards are the  
6 primary source of value, and therefore that 2.25 for the  
7 total wouldn't tell you anything about what they valued the  
8 individual components like 802.11 or H.264.

9 Q A couple of other topics, Professor Murphy. Now, Motorola  
10 suggested that if Microsoft had simply negotiated rather than  
11 filed this lawsuit that the parties could have reached a RAND  
12 license. Are you aware of that testimony that has been  
13 presented?

14 A Yes.

15 Q And as an economist, what is your view of that?

16 A I don't think that is consistent with the economic  
17 evidence that I have seen.

18 Q Does the fact that a patent owner is willing to negotiate  
19 mean that it is not engaged in hold-up?

20 A No. If I am holding you up, I may be negotiating, but  
21 then we are just negotiating over the hold-up value; we are  
22 negotiating over how much I am going to hold you up for. The  
23 question is not whether I am negotiating, the question is  
24 what leverage I am exerting on you. If I am exerting  
25 leverage, looking to just get the value of my patent, I am

1 not holding you up. But if I am using the leverage that  
2 comes from the standard and the value of the standard, then I  
3 am holding you up, even if I am negotiating over how much I  
4 am going to hold you up for.

5 Q Now, in light of the underlying economics regarding the  
6 RAND commitment and the hold-up, can negotiations alone  
7 protect against hold-up?

8 A No. Because, remember, once the standard is implemented  
9 and widely adopted, the value the user places on getting  
10 access to that standard. And therefore, if I can deny him  
11 access by denying him access to my patent, the value of what  
12 he is willing to pay to get the standard is determined by the  
13 hold-up value. That's what he is going to be willing to pay  
14 based on. So if you just tell me I need to negotiate with  
15 him, I will be able to negotiate based on his hold-up value.  
16 So there is no way in which a requirement to negotiate could  
17 possibly eliminate the ability to hold people up.

18 Q Were you present when the testimony of Jennifer Ochs from  
19 Marvell was provided earlier today?

20 A Yes, I was here when her testimony was read.

21 Q It may have been yesterday.

22 A That's what I was wondering about.

23 Q How do the terms that Motorola proposed to Marvell bear on  
24 your analysis of whether its conduct is more consistent with  
25 hold-up or with providing a RAND license to Microsoft?

1 A I would say a couple of things. One, it was substantially  
2 later, yet they still demanded a 2.25 royalty payment from  
3 Marvell, based on the final product price. That's one thing.  
4 So as I said, they hadn't changed that demand even though  
5 time had passed and presumably had more information.  
6 Secondly, they carved Microsoft out. They told Marvell,  
7 while we will offer you a license, it won't cover the primary  
8 driver of why you were seeking a license, namely Microsoft.  
9 That was consistent with them trying to maintain the pressure  
10 on Microsoft.

11 Q Now, I think you said earlier that you had testified in  
12 this courtroom in the fall trial where the RAND rate was set?

13 A Yes, I did.

14 Q Have you prepared -- Let's put up PDX 43.

15 MR. PRICE: Your Honor, can we have a sidebar? We do  
16 have an objection as to this one.

17 (Sidebar discussion outside of the jury's presence.)

18 MR. PRICE: Your Honor, this is being presented now  
19 as an undisputed fact. But the problem with this is that  
20 that was not the contention. It was 2.25 percent minus  
21 offsets and with caps. This is completely misleading.

22 MR. PRITIKIN: This was taken almost verbatim from  
23 the finding. It may well be finding of fact 130, if we can  
24 look at it. This is exactly what the court said. The fact  
25 is they were using the 2.25 --

1                   THE COURT: Which finding?

2                   MR. PRITIKIN: You wrote it down there, your Honor.

3                   For the benefit of the court, it says --

4                   MR. PRICE: Let me get my copy of the findings and  
5 show you the other.

6                   MR. PRITIKIN: Page 130. I'm sorry.

7                   THE COURT: He changed it to --

8                   MR. PRITIKIN: Page 130.

9                   THE COURT: It would be after 406. And it says,  
10 title, "Motorola's Suggested Comparables." It is on  
11 Page 130.

12                  MR. PRICE: If you look on 131, it talks about 2.25  
13 end-product royalty, capping that, and then expressing a  
14 different rate as a result of that.

15                  MR. PRITIKIN: Your Honor, you had sorted through  
16 this in the findings. That is putting it in a box, where  
17 they try to attribute some value to the grant-back from  
18 Microsoft. That was the way it was done. But the bottom  
19 line is they were starting with a value of 2.25 for Xbox and  
20 Windows, and then, as you wrote, sought the amount -- they  
21 were indifferent as to whether it was in the form of  
22 grant-back monetary payments. And that's the single point I  
23 want to bring out.

24                  THE COURT: I am not going to allow you to use one  
25 that doesn't have a date on it. That is misleading.

1                   MR. PRITIKIN: I won't use the date from that.

2                   THE COURT: You are not going to be using it to say  
3 it is undisputed, because I don't think there is an  
4 undisputed holding to that effect.

5                   MR. PRITIKIN: I will deal with that, your Honor (End  
6 of sidebar.)

7 By Mr. Pritikin:

8 Q Can we put up PDX 43? Professor Murphy, what is your  
9 understanding of the royalty rate that was asked for by  
10 Motorola at the November --

11                  THE COURT: I just ruled on this, counsel. I said  
12 you were not to put it up.

13                  MR. PRITIKIN: I'm sorry. I thought you said I was  
14 not to call it --

15                  THE COURT: I said you were not to use it. Take it  
16 down.

17                  MR. PRITIKIN: I won't use it.

18                  THE COURT: Let's go on, counsel.

19                  MR. PRITIKIN: I'm sorry. I misunderstood, your  
20 Honor.

21 By Mr. Pritikin:

22 Q Just a couple more questions, Professor Murphy. Putting  
23 together the entire course of conduct, can you state again  
24 what conclusions you have reached?

25 A I would say, based on my economic analysis of Motorola's

1 course of conduct, their behavior was much more consistent  
2 with them seeking to hold up Microsoft, and therefore  
3 leverage the value of the standard to get more favorable  
4 terms in their licensing negotiations with Microsoft than it  
5 was to offer a RAND rate. That flows from analysis of the  
6 offer that they made and the letters, their continued  
7 positions that they took over time, the seeking of  
8 injunctions to back that up, the big gap that existed between  
9 the value of the standard and their individual contributions,  
10 the enormous difference between the rates they requested and  
11 what were determined to be the RAND rates. An economic  
12 analysis says it is much more consistent with an effort to  
13 hold Microsoft up. The fact that they didn't make more  
14 effort to figure out what the value of the underlying patents  
15 were is very consistent with a notion that really what  
16 mattered was the ability to exert pressure on Microsoft by  
17 denying them access to the standard through their  
18 standards-essential patents, which to me is the economic  
19 notion of hold-up.

20 MR. PRITIKIN: I have no further questions, your  
21 Honor.

22 THE COURT: Why don't you get started, Mr. Price?

23 CROSS-EXAMINATION

24 By Mr. Price:

25 Q Good afternoon, Professor Murphy. We will be talking to

1 each other tomorrow, too, I guess.

2 A It looks that way.

3 Q Let me start out, since we are at the end of the day, with  
4 some fairly simple questions so I don't have to think too  
5 much. And I want to talk about your prior engagements with  
6 Microsoft. If I am correct, those started sometime in the  
7 1990s?

8 A Yeah. It would have been the late 1990s, yes.

9 Q And I think you said you testified in four trials?

10 A I believe that's correct.

11 Q I will try to get a sense of -- Do you have a sense of  
12 how much you have been compensated over the years by  
13 Microsoft as a result of consulting with them?

14 A I have never added it up, no.

15 Q Okay. As an economist, you probably have some idea as to  
16 the contribution that Microsoft has made to your  
17 compensation, at least on a macro economics level -- micro  
18 economics level, I'm sorry, over the last -- since the late  
19 1990s? Certainly you have some idea of that.

20 A I would say over that period it has amounted to several  
21 hundred thousand dollars.

22 Q Do you think it might be higher than that?

23 A I don't know the total, but it would definitely be several  
24 hundred thousand.

25 Q Let's talk about maybe your hourly rate. Let's talk about

1 your current hourly rate. Could you tell us what that is?

2 A Yeah. My hourly rate is \$1,250 an hour.

3 Q If we focused just on how much you have made from working  
4 on this case -- You said you have been working on this case  
5 for two years?

6 A Yes.

7 Q How much have you made just working on this case in the  
8 last two years?

9 A Probably around \$200,000, something like that, these  
10 matters involving Motorola, not just this current matter we  
11 are talking about here.

12 Q You are saying in the past two years alone it has been,  
13 you think, somewhere around \$200,000?

14 A That is a really rough estimate, because I don't have the  
15 exact figure.

16 Q Have you been asked this kind of question before when you  
17 have testified, how much money you have made?

18 A I have, yes.

19 Q Is it a practice not to have available -- You said you  
20 don't have the materials available to actually tell me how  
21 much you have made. Is there a reason for that?

22 A I don't carry them around with me, no. I could probably  
23 go back and total it up.

24 Q I am asking, because you kind of anticipated I am going to  
25 ask that question, how much have you been paid to do this.

1 You get asked that all the time?

2 A Sometimes, sometimes not. It just depends.

3 Q You kind of thought I would ask that, right?

4 A I thought you would ask my hourly rate. People generally  
5 do. Sometimes they ask totals, sometimes they don't.

6 Q Is there a reason you didn't check to see what you had  
7 been paid to date before you took the stand?

8 A No particular reason. It is just not something I  
9 generally do.

10 Q It is around \$200,000 in the last couple of years, so that  
11 is from 2010 to 2012?

12 A Yeah, roughly. Roughly about two years, I guess.

13 Q I will ask you again, if you go back to the late '90s, and  
14 you have worked on at least four trials, can you give me --  
15 with that in mind, give me a better estimate of how much you  
16 have been paid, other than just hundreds of thousands of  
17 dollars?

18 A I think that's the best way. It certainly would be  
19 several hundred thousand dollars, no doubt about it.

20 Q In addition to paying your hourly rate, Microsoft has also  
21 funded some of your research?

22 A I did some research work for Microsoft before I ever did  
23 consulting -- litigation consulting for Microsoft.

24 Q And if someone looked at your curriculum vitae -- Am I  
25 pronouncing that right?

1 A I think so, yes.

2 Q Your resume. If someone looked at your resume, would we  
3 find on there, for example, some papers that you have written  
4 that were funded, at least in part, by Microsoft?

5 A Oh, yes.

6 Q So if we looked at it, about how many papers has Microsoft  
7 funded?

8 A Maybe a couple.

9 Q And is that in addition -- the compensation for that --  
10 Let me rephrase that. The funding for those papers, that  
11 would be in addition to the several hundred thousand dollars  
12 that you have been paid?

13 A No, I would have included that.

14 Q Let me talk about the way you looked at the case. I am  
15 going to put up a timeline. It is a timeline we created for  
16 demonstrative purposes. Let's see if we can go through the  
17 timeline. You spent a significant amount of time doing  
18 analysis and calculations on the October 21st, 2010 and  
19 October 29th, 2010 letters, correct?

20 A That's correct.

21 Q You see in the timeline that Motorola files a lawsuit  
22 November 10, 2010, correct?

23 A Yes.

24 Q And one of the things that you are equipped to do is kind  
25 of applied economic analysis to see how rational actors would

1 work in certain situations, correct?

2 A That is generally how we approach economics, yes.

3 Q And to look at it kind of economically, in terms of what  
4 would these letter demands -- what effect would they have on  
5 Motorola's ability to win a lawsuit or get an injunction, to  
6 apply that analysis you have to know something about the  
7 court system and the law, right?

8 A Not necessarily. I mean, I didn't in my analysis focus on  
9 that side of it. I mean, you could. I focused much more on  
10 the economic side and what their incentives would be if they  
11 were interested in negotiating RAND rates versus interested  
12 in engaging in hold-up.

13 THE COURT: Mr. Price, we are going to run out of  
14 time here.

15 MR. PRICE: Oh, gosh.

16 THE COURT: I know you are just getting started.  
17 Ladies and gentlemen, I am going to spare you the speech,  
18 because I am sure you can probably all recite it by heart at  
19 this point. I will tell you tomorrow we will get started at  
20 our usual 9:00 a.m. We will be going to 4:30. The following  
21 week, please remember Monday is the holiday, so all of you  
22 who were planning on three days away, you have three days  
23 away.

24 And then I have been asked a question about your  
25 deliberations. They are going to start on Wednesday, because

1 the schedule that day is you are going to hear closing  
2 arguments, which I'm sure you are all looking forward to, and  
3 my instructions, which you are probably not looking forward  
4 to. Because at that point you will be in deliberations, we  
5 will buy you lunch. And you don't get to go outside. There  
6 is a trade-off. And lunch is really good the first day.  
7 After that it may start to look a little routine.

8 A question was asked about what are the hours to that.  
9 The answer is you should chat about that among yourselves. I  
10 have some flexibility. You don't have to keep exactly the  
11 same hours that you were keeping here. On the other hand,  
12 you all know the difficulty you have had in getting here by  
13 9:00. That is something you should chat about between  
14 yourselves. It is not unusual for people to say that they  
15 want to start at 8:30. Much before 8:00 starts to creat  
16 problems. The courthouse is open, but the clerk's staff  
17 isn't. You have a way to get into the jury room, but you  
18 need to be considerate of everybody's schedule. That is  
19 something that you can best decide among yourselves.

20 Other than that, thank you for all of your patience today.  
21 As I have indicated, we are going to be talking about jury  
22 instructions, so when you go by you will see everybody with  
23 their coat off working hard, but you in the meantime can flee  
24 and go home. We will see you all tomorrow.

25 (At this time the jury left the courtroom.)

THE COURT: Any matters to take up before we retire  
for the day?

3 MR. HARRIGAN: Only what you want to do about jury  
4 instructions, which I assume we will find out.

5 THE COURT: Mr. Price, any formal matters we need on  
6 the record?

7 MR. PRICE: No, your Honor.

8                   THE COURT: I am going to recess for the day. We  
9 have asked the marshals to detain one individual who I would  
10 like to talk to. The rest of you are free to go, and we will  
11 be doing jury instructions. Thank you. We will be in  
12 recess.

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14 | (The proceedings recessed.)

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## C E R T I F I C A T E

We, Barry Fanning and Debbie Zurn, Official Court Reporters for the United States District Court, Western District of Washington, certify that the foregoing is a true and correct transcript from the record of proceedings in the above-entitled matter.

DATED this ^ day of August, 2013.

/s/ Barry Fanning

/s/ Debbie Zurn

## **Barry Fanning, Court Reporter**

**Debbie Zurn, Court Reporter**